UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS and NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO and CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS and NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 11, AFL-CIO	Case 5-CA-31828 Case 5-CA-33125 (formerly 2-CA-36129)

BRIEF OF CNN AMERICA, INC. EXCEPTING TO THE REPORT AND RECOMMENDATIONS OF ADMINISTRATIVE LAW JUDGE PAUL BUXBAUM

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INTRODUCTION

In its Order of May 30, 2008, 352 N.L.R.B. No. 85 (May 30, 2008), the National Labor Relations Board (the "Board" or "NLRB") granted CNN's Petition for Special Permission to Appeal Administrative Law Judge Arthur Amchan's order enforcing Subpoena Duces Tecum No. B-522050, served by the General Counsel on behalf of the NLRB, and Subpoena Duces Tecum No. B-441992, served by Charging Party National Association of Broadcast Employees & Technicians Local 31 ("Local 31" or "the Union").[1] While the Board granted CNN's Petition and found its objections to the subpoenas "plausible," *id.* at 2, it did not itself resolve the enforceability of the subpoenas. Instead, the Board ordered the appointment of a Special Master and directed him to assist the parties in resolving disputes concerning production of documents. In the event it was not possible to resolve such disputes, he was directed to conduct the "extensive analysis required under the Federal Rules and *The Sedona Principles*" in connection with CNN's challenge to the subpoenas and make recommendations to the Board. *Id.*

The parties were not able to resolve their disputes, despite extensive mediation by the Special Master, thus leaving all issues regarding production pursuant to the subpoenas unresolved. Yet in his December 1, 2008 ruling, Administrative Law Judge Paul Buxbaum did not conduct the "extensive analysis" of the subpoenas that he was ordered to perform. Nor did he make recommendations with respect to the enforceability of the subpoenas as enforced by Judge Amchan and as appealed by CNN. Instead, he ignored almost all of the subpoenas and almost all of CNN's objections to them, and concluded that the General Counsel, long after the trial had ended, had withdrawn its 243 paragraph Subpoena except as to four specific paragraphs.

[1] Because the General Counsel's subpoena is primarily at issue here, in this brief CNN will refer to Subpoena B-522050 simply as "the Subpoena," and to both subpoenas collectively as "the subpoenas."

That conclusion is contrary to the position the General Counsel took throughout the trial and in submissions to both Judge Buxbaum and Judge Amchan. Judge Buxbaum further concluded that even as to the documents sought in those four paragraphs, the only documents in question were those on CNN's privilege log. Rather than addressing even the enforceability of those four subpoena paragraphs themselves (let alone the enforceability of the subpoenas in the first instance), Judge Buxbaum chose to consider only the burden of producing privileged documents responsive to those four paragraphs, a self-fulfilling prophecy insofar as CNN already had identified, located, and segregated those documents specifically listed on its privilege log.

In so doing, Judge Buxbaum ignored the Board's order to consider the enforceability of the subpoenas themselves in the event the parties were unable to resolve their differences, and instead allowed the General Counsel and Local 31 to insulate those subpoenas from any meaningful review by the Board. He recommended that the Board issue an order requiring the production of privileged documents for *in camera* inspection, even though the Board already issued such an order on May 9, 2008, 352 N.L.R.B. No. 64. That Order was issued well before the Board granted CNN's Request for Special Permission to Appeal and ordered the appointment of a Special Master. Significantly, the General Counsel in mid-June, nearly six months prior to Judge Buxbaum's ruling, began judicial enforcement proceedings of the Board's May 9 order, thereby effectively transferring jurisdiction over this very issue to the federal judiciary. Judge Buxbaum's recommendation that the Board merely reaffirm its prior ruling in these circumstances underscores how seriously he misunderstood his mandate.

CNN submits that the Special Master's recommendations to the Board regarding the enforceability of the subpoenas should be rejected in their entirety. Rather than remand for additional Special Master proceedings, the Board should issue a final order finding the

subpoenas unenforceable, and formally reversing Judge Amchan's Order enforcing them. CNN explains below.

ARGUMENT

I. THE BOARD MUST REVIEW THE SPECIAL MASTER'S RECOMMENDATIONS *DE NOVO.*

On December 11, 2008, the Executive Secretary rejected CNN's request to treat Judge Buxbaum's Report and Recommendations in the same fashion as any other Administrative Law Judge decision, which would have allowed CNN to file exceptions to the Report and Recommendations and allowed the Board to conduct a *de novo* review.[2] Instead, the Executive Secretary issued an unprecedented "Notice to Show Cause" requiring that CNN demonstrate why the Board should not accept Judge Buxbaum's Report and Recommendations in its entirety. As explained below, it would be wholly improper for the Board to defer to this "ruling" and force CNN to bear the burden of showing why the recommendations should not be accepted.[3]

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[2] There are no provisions in the National Labor Relations Act (the "Act") or the Board's own Rules and Regulations authorizing show cause review of any Administrative Law Judge's decision, and the Board's Rules and Regulations do not contain any provision governing the filing of exceptions, objections, or any other response to the recommendations of a special master. CNN requested that Judge Buxbaum's Report and Recommendations be treated as a final decision and recommended order of an administrative law judge to which exceptions may be filed pursuant to Section 102.46 of the Board's Rules and Regulations and which would be reviewed *de novo* by the Board. Judge Buxbaum's Report and Recommendations, like the decision of any administrative law judge, suggest a course of action based upon the recommended resolution of certain questions of law and fact regarding the enforceability of the Subpoena. CNN has not provided a set of exceptions to accompany this brief, pursuant to the Executive Secretary's order. CNN is of course willing to provide exceptions should the Board wish to review them.

[3] In addition to the arguments set forth in the text, we note that the Executive Secretary's office has a potential conflict of interest in this matter, insofar as Executive Secretary Lester Heltzer's son is one of the General Counsel's attorneys who has been prosecuting this case. While CNN presumes (without actually knowing) that Mr. Heltzer has recused himself from any consideration of this issue, CNN suggests that the Executive Secretary's decision, presumably (continued...)

Judge Amchan originally issued an order declaring the subpoenas enforceable. Pursuant to Section 102.26 of the NLRB Rules and Regulations, CNN sought Special Permission from the Board to appeal that ruling, which the Board granted. The Board – not an Administrative Law Judge bestowed with the title of "Special Master" – is required to decide the issues presented in CNN's appeal. The Board cannot delegate the ruling on CNN's Special Appeal to an Administrative Law Judge and, in essence, abdicate its responsibility to decide the Special Appeal by rubber-stamping his decision based on "show cause" review.

Section 3(b) of the Act, 29 U.S.C. § 153(b), identifies only two situations in which it is lawful for the Board to delegate its powers.[4] Neither permits the Board to delegate resolution of a special appeal to an Administrative Law Judge or "Special Master." Because it may not delegate its decisionmaking to a Special Master, the Board itself must review *de novo* any recommendations by a Special Master and issue its own, independent ruling. This is especially true here, where the Board itself granted CNN's Petition for Special Permission to Appeal and found CNN's claims of overbreadth and undue burden "plausible." CNN is entitled to a ruling from the Board on its Special Appeal. Just as Judge Amchan's original order enforcing the

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(...continued)

made by individuals reporting directly to Mr. Heltzer, be afforded no deference for this reason as well.

[4] The first situation allows the Board to delegate authority "to any group of three or more members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b). The second situation allows the Board to delegate "to its regional directors its powers under Section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof . . . ." *Id.*

Subpoena is not subject to a "show cause" standard, neither is Judge Buxbaum's recommendation on the particular matters referred to him.[5]

II. THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS SHOULD BE REJECTED AS A WHOLE.

Judge Buxbaum's recommendations should be rejected in their entirety for three, independent reasons: (1) Judge Buxbaum acted outside of his mandate from the Board; (2) the General Counsel and Local 31 as a matter of public policy should not be permitted to shield the subpoenas from meaningful (or any) review; and (3) the Board order creating the Special Master procedure is invalid because it was not issued by a quorum. CNN discusses each argument in turn.

A. Judge Buxbaum's Recommendations, Which Address Only CNN's Claim Of Privilege As To Certain Documents, Are Inconsistent With The Board's Mandate.

In analyzing and issuing recommendations solely concerning documents listed on CNN's privilege log, Judge Buxbaum acted wholly outside the scope of his mandate from the Board. This is made clear by a review of the timeline of events regarding the subpoena enforcement proceedings.

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[5] The same result would follow under Fed. R. Civ. P. 53(f), which provides for *de novo* review of a Special Master's findings of fact and conclusions of law in the federal courts. Under Rule 53, claims that a Special Master has misconstrued or exceeded his mandate are reviewed *de novo*, *Medtronic Sofamor Danek, Inc. v Michelson*, Nos. 01-2373, 03-2055, 2004 WL 2905399 (W.D. Tenn. May 3, 2004), as are rulings regarding the production of documents and issues of privilege. *In re Marsh & McLennan Cos., Inc. Sec. Lit.*, No. 04 Civ. 8144, 2008 WL 2941215 (S.D.N.Y. July 30, 2008) (scope of discovery and privilege); *United States v. Philip Morris USA Inc.*, Civ. A. No. 99-2496, 2004 WL 3253662 (D.D.C. Sept. 9 2004) (same); *Diversified Group, Inc. v. Daugerdas*, 304 F. Supp. 2d 507 (S.D.N.Y. 2003) (same). Judge Buxbaum's construction of his mandate, as well as his findings of fact and conclusions of law with regard to the standards to be applied in determining overbreadth and his factual findings regarding undue burden, all would be reviewable in federal court *de novo*, and they should be so reviewed by the Board.

- On the first day of trial in early November 2007, Judge Amchan issued an order enforcing both subpoenas in their entirety.
- On December 6, 2007, CNN filed its Petition for Special Permission to Appeal that order.
- On March 10, 2008, while CNN's Petition for Special Permission remained pending before the Board, Judge Amchan ordered CNN to turn over to him for *in camera* inspection documents listed on CNN's privilege and redaction logs within a specified time frame. CNN did not file a Petition for Special Permission to Appeal this ruling.
- On May 9, 2008, the Board (at the General Counsel's behest) "severed" Judge Amchan's March 10 privilege ruling from the overall dispute regarding the enforceability of the subpoenas, and ordered CNN to comply with Judge Amchan's order or to turn over the privileged documents to Judge Amchan or another ALJ for *in camera* inspection. *CNN America, Inc.*, 352 N.L.R.B. No. 64 (2008).
- Several weeks later, on May 30, 2008, the Board granted CNN's Petition for Special Permission and, *inter alia*, ordered the appointment of a Special Master. *CNN America*, 352 N.L.R.B. No. 85.
- On June 19, 2008, the General Counsel filed a lawsuit in the District Court for the Southern District of New York seeking to enforce the Board's May 9 order on privilege and *in camera* review.

This sequence of events plainly demonstrates that an analysis of privilege claims and *in camera* review was not part of the task assigned to Judge Buxbaum. In its Order of May 30,

2008, the Board neither asked nor authorized the Special Master to address the General Counsel's challenge to CNN's claims of privilege and the General Counsel's demand for *in camera* review. Having already severed that issue from CNN's appeal and ruled on that issue on May 9, the Board surely did not include that question in the May 30 Order. Indeed, CNN's Request for Special Permission was filed months before the issue of *in camera* review of privileged documents ever arose. *See* Hearing Tr. 4/11/08 at 10,846 (JUDGE AMCHAN: "CNN has not filed a special appeal with regard to my ruling on the privilege log."); Hearing Tr. 4/7/08 at 9,921 (MR. FASMAN: "[T]here is no special appeal on the privilege issue at all. We have never put in the special appeal on the issue of Your Honor's ruling, [sic] that we turn over all the privilege logs. We have never appealed that in the first place. That is not before the [B]oard.") (cited transcript excerpts are attached as Exhibit 1). The General Counsel confirmed as much on the record on June 11, 2008:

> MR. BIGGAR: Before I call my first witness, Your Honor, I just want for clarification purposes. Does Respondent intend to have the Special Master make any decisions about any of our objections to the documents on your privileged log or your redaction log, or is that something that you don't intend to include in that proceeding?
>
> MR. FASMAN: I think our position has been pretty clear that we don't think it's appropriate then to handle it at the administrative level, so -- I mean -- yeah, I don't think that that's something that we see is within the Board's order, either, because they dealt with that separately in a separate order.
>
> MR. BIGGAR: Okay...

Hearing Tr. 6/11/08 at 13,925.

Despite this sequence, Judge Buxbaum nonetheless recommends that the Board simply reissue a slightly more limited version of the same order the Board already issued on May 9, 2008, and disregard every other issue concerning the enforceability of the subpoenas. Judge

Buxbaum recommends that the Board order CNN to "identify those items listed on its Revised Privilege and Redaction Logs that are responsive to Paragraphs 26, 36, 40, and 43 of the subpoena duces tecum and submit those items to the administrative law judge for in camera inspection." Report and Recommendation at 17. But in its Order of May 9, 2008, the Board already ordered CNN "to produce those documents [on CNN's second revised privilege and redaction logs] to [an administrative law] the judge for in camera inspection." *CNN America,* 352 N.L.R.B. No. 64, slip op. at 1. Ironically, Judge Buxbaum recommends that CNN be ordered to turn over these documents "pursuant to the Board's Order in *CNN America, Inc.*, 352 N.L.R.B. No. 64 (2008)." It is nonsensical for the Special Master to recommend that the Board order CNN to do something it already ordered CNN to do, and to cite the previous order as support for his recommendation! This further illustrates why the privilege issues were never part of the Special Master's assignment – they already were decided by the Board.

Equally significant, even assuming *arguendo* that the Special Master somehow had some jurisdiction over questions of privilege and *in camera* review at the time of his original appointment, the General Counsel removed such issues from his jurisdiction when it filed enforcement proceedings in the Southern District of New York on June 19, 2008, more than five months before Judge Buxbaum made his recommendations. How can Judge Buxbaum decide an issue that the Board already ruled upon and the General Counsel already placed before an Article III Judge in federal district court? By filing suit as it did, the General Counsel (at least until it concocted its current strategy for insulating its overbroad and improper Subpoena from meaningful review) also surely considered the privilege issue outside of the Special Master's purview, and accordingly turned jurisdiction of it over to the federal judiciary.

B. As A Matter Of Public Policy, The General Counsel Should Not Be Permitted To Insulate The Subpoena From Plenary Review.

On the eve of trial, the General Counsel served its unprecedented 243 paragraph electronic discovery "trial" subpoena on CNN, which was followed by a similar subpoena served by Local 31. The General Counsel and Local 31 stood behind the enforceability of their subpoenas through the duration of the trial and used them for their benefit, as explained below. But now that the trial is over and the subpoenas can no longer serve a threatening purpose, the General Counsel and Local 31 have tossed them aside and hope to insulate them from any form of administrative or judicial review. Public policy cannot permit such a strategy, in which litigants are allowed to change the rules after the game is played.

The General Counsel and Local 31 wielded the subpoenas like clubs to bludgeon CNN throughout the trial, obtaining tens of thousands of documents from CNN, yet repeatedly demanding adverse inferences and other sanctions against CNN for its alleged failure to comply with the subpoenas. *See, e.g.*, Hearing Tr. 1/14/08 at 3,432 (threatening to seek adverse inference if CNN did not produce additional "payroll records"); 1/28/08 at 5,424 (objecting to use of disciplinary memo from former TVS employee's personnel file and requesting *Bannon Mills* sanctions); 2/21/08 Confidential Session at 3 (seeking *Bannon Mills* sanctions for CNN's alleged failure to produce "payroll records") and at 6 (stating intention to seek adverse inference for CNN's alleged failure to produce additional "payroll records"). The General Counsel also sought adverse inferences against CNN in its post-trial brief. *See* Brief on Behalf of the General Counsel to the Administrative Law Judge, at 133 (seeking an adverse inference for the non-production of 2004 performance evaluations for Washington, DC Photojournalists) (attached as Exhibit 2). Critically, it in fact obtained decisional sanctions from Judge Amchan on a number of occasions, as he based his rulings in part upon CNN's alleged failure to produce documents in

response to the subpoenas. *See, e.g.,* Decision, at 95, lines 45-48 (relying upon allegedly missing records in making credibility determinations); 140, lines 18-26 (same); 144, lines 44-48 (same). Only when the trial was over, and the Special Master required the General Counsel and Local 31 to state their positions on the enforceability of the subpoenas, did the General Counsel and Local 31 back away from the subpoenas and declare that they sought only to enforce a small portion of the Board Subpoena. Yet even then, the General Counsel took advantage of CNN's good faith efforts to comply reasonably with the Subpoena and provide a privilege log by honing in on CNN's privileged materials to the exclusion of all other documents.

Such blatant opportunism mocks the litigation system and disserves public policy. If a litigant in Board proceedings were allowed to serve an overly broad, inappropriate and unenforceable subpoena, insist upon compliance and use the pending subpoena as a threat during a trial, obtain adverse inferences based on it in the Administrative Law Judge's decision, and then subsequently abandon the subpoena once it appeared that the subpoena was finally being subjected to effective review, parties would never have any incentive to issue reasonable, appropriate subpoenas. Nor would unreasonable subpoenas, by any party, ever be subject to effective review. Indeed, such conduct in the context of discovery requests in civil court proceedings is sanctionable. *See Kenney, Becker LLP v. Kenney*, No. 6 Civ. 2975, 2008 WL 681452 (S.D.N.Y. Mar. 10, 2008) and No. 6 Civ. 2975, 2008 WL 1849544 (S.D.N.Y. Apr. 22, 2008) (where subpoena was blatantly improper, withdrawal of the subpoena did not insulate the proponent from sanctions); *In re Olympia Holding*, 189 B.R. 846, 856-57 (Bankr. M.D. Fla. 1995) (even though plaintiff "voluntarily withdrew" some of its discovery requests, the withdrawal occurred only after the court had begun hearings on them, and sanctions for vexatiously propounding discovery were therefore appropriate; the court noted that one factor to

consider in imposing sanctions is "the timing of, and circumstances surrounding, any voluntary withdrawal" of the offending discovery); *cf. Landsman Packing Co., Inc. v. Continental Can Co., Inc.*, No. 87 Civ. 9383, 1988 WL 13318, at *1 (N.D. Ill. Feb. 17, 1988) (plaintiff's withdrawal of a premature and ungrounded motion was relevant only to the amount of the sanctions to be applied). In this matter, the General Counsel and Local 31's egregious conduct with respect to the subpoenas warrants a finding that they should not be enforced at all, and that the Special Master's Report and Recommendations should be rejected.

C. The Special Master's Recommendations Should Not Be Accepted Because The Board Order Creating The Special Master Procedure Was Not Issued By A Quorum And Is Therefore Invalid.

CNN submits that at the time the Board issued its order appointing a Special Master, there was no properly constituted three-member panel of the Board and that the entire Special Master process was created through an order of two Board members who had no power or authority to act on behalf of the NLRB. The Special Master's Report and Recommendations therefore should be rejected outright.[6]

III. AS CONSTRUED BY JUDGE BUXBAUM, THE DISPUTE OVER THE ENFORCEABILITY OF THE SUBPOENAS IS MOOT.

If this dispute concerns only whether the General Counsel and Local 31 may have access to privileged documents after *in camera* review, as opposed to whether the subpoenas are enforceable as a whole, this matter should be dismissed as moot. The hearing in this case is over, the record is closed, Judge Amchan has issued his decision, and the matter has been

[6] CNN will not brief this matter in this filing, unless so directed by the Board, as the Board surely has no need of further briefing on an issue that has arisen and been briefed in some 65 Board cases. To the extent the Board wishes further citation of authority on this issue, CNN refers to the brief of Petitioner in *Laurel Bay Healthcare v. NLRB*, Nos. 08-1162(L), 08-1214, currently pending decision in the District of Columbia Circuit, as an appropriate statement of points and authorities on this issue.

transferred to the Board. Even if the General Counsel and Local 31 obtained additional documents responsive to the subpoenas – which is entirely speculative, given that all they seek right now is an *in camera* review of certain documents, which could result in every one of CNN's claims of privilege being upheld – there is no open proceeding in which to introduce the evidence, no relief not yet awarded, and no grounds upon which to reopen the long-closed record. Accordingly, if Judge Buxbaum is correct and the only remaining issue is after-the-fact access to privileged documents, the dispute over the enforceability of the subpoenas is moot, and the Board should reject the Special Master's recommendations.[7]

A. The Subpoenas Lost All Compulsive Effect Once The Trial Ended And The Record Closed.

Because there is no provision for pre-trial discovery in Board proceedings, the only permissible purpose for subpoenas in NLRB proceedings is to secure the production of evidence for use at trial. *See, e.g.*, *Aramark Corp.*, 1999 N.L.R.B. LEXIS 174 (Mar. 25, 1999) (documents are subpoenaed for trial to be used in the cross-examination of witnesses); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-58 (2d Cir. 1970) ("It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery [and accordingly the Board is permitted to seek information only] for the purpose of obtaining and preserving evidence for trial, not for the purpose of discovery"). Once a trial ends and the Administrative Law Judge renders a decision, any subpoenas issued during the trial seeking production of

[7] As discussed below in Section IV, this matter is not moot as to the overall enforceability of the subpoenas. Although a dispute over the future production of additional documents is now moot, questions concerning Judge Amchan's prior enforcement of the subpoenas in their entirety, which significantly affected the conduct of the trial, and his reliance upon CNN's alleged failure to produce documents in his decision on the merits, are most certainly not moot. The question of whether his original decision to enforce the subpoenas was correct, which CNN took up in its Special Appeal, must be answered by the Board.

documents or attendance of witnesses become moot, because there no longer exists any valid purpose for the production of additional documents or compulsion of witnesses in response to the subpoenas. *See Tritac Corp.*, 286 N.L.R.B. 522, 543 n.83 (1987) (ALJ found that enforcement of the General Counsel's trial subpoena was moot because he already determined that the employer violated the Act); *Indiana and Michigan Elec. Co.*, 229 N.L.R.B. 576, 585 n.36 (1977) (ALJ refused to decide the enforceability of the respondent's subpoenas because he found in favor of the respondent on the underlying charges).

As this case was being tried before Judge Amchan, if the General Counsel or Local 31 believed that documents listed on CNN's privilege log might be critical to their case, their recourse was to request that Judge Amchan suspend the trial until subpoena enforcement proceedings were concluded, which, as shown below, is not an uncommon occurrence. Such a request was never made, even after Judge Amchan repeatedly advised the General Counsel and Local 31 of his intention to close the record and rule promptly after the trial was over, and cautioned them that they should not drag their feet with respect to enforcement proceedings in District Court. *See* Hearing Tr. 4/11/08 at 10,846 (JUDGE AMCHAN: "I have no intention of holding this case open until sometime next year."); 4/7/08 at 10,032 (JUDGE AMCHAN: "I don't understand. I would want some representation from general counsel why can't you go to District Court with the special appeal pending and it's certainly not true with regard to the privilege log. . . . I'm not waiting forever for you to go to District Court. If we are done by August and nothing has happened on the District Court front, I am going to say record closed, briefs in 60 days, you can expect a decision from me in 90."). Moreover, Judge Amchan made clear that he would hold the record open only if the General Counsel could assure him that District Court enforcement proceedings were underway and likely to produce prompt results.

See Hearing Tr. 4/9/08 at 10,446-47 (MS. FOLEY: "The other issue I'd like to speak to you about judge is you had indicated that if we don't proceed rapidly in District Court and if we don't have the records that we feel that we're entitled to, if the District Court hasn't ruled by August, that you were going to close the record and that would necessitate our taking a special appeal. Is that your position?" JUDGE AMCHAN: "Yes. With the caveat, if, for example, let's say we're done August 1st, and the District Court process has begun, then I would leave the record open until that was finished.").

In the face of these explicit warnings, the General Counsel made no request to hold open the record or suspend the hearing or decision pending the outcome of proceedings to enforce the production of privileged documents *in camera*. Judge Amchan closed the record at the conclusion of the trial, issued his decision, and transferred jurisdiction over the matter to the Board. The subpoenas are now without any force or effect. The time to pursue the production of documents pursuant to the subpoenas has long since passed.

B. There Are No Grounds To Reopen The Trial Record.

Even if the trial subpoenas still had some continued vitality after the end of the trial and the close of the record (which they do not), and *even if* the General Counsel or Local 31 someday obtained additional documents from CNN (which is uncertain at best, and may take years to resolve), and *even if* the General Counsel or Local 31 determined that the documents were worthy of introduction into the record, the only procedural mechanism for introducing such evidence would be to reopen the record. That would be impossible here, as the General Counsel and Local 31 never could meet the criteria necessary for reopening the record.

Under the Board's Rules and Regulations and established Board law, a party may seek to reopen the record to introduce newly discovered evidence only in "extraordinary circumstances" requiring proof that: (1) introduction of the documents would alter the outcome, and (2) the party

exercised reasonable diligence to obtain the documents during the trial. *See NLRB Rules and Regulations* § 102.48(d)(1); *Shane Steel Processing, Inc.*, 353 N.L.R.B. No. 58, slip op. at 20 (2008) (where General Counsel did not seek enforcement of the subpoenas requesting the documents during the hearing, the General Counsel failed to act with the requisite "reasonable diligence" to support a reopening of the record); *Fitel/Lucent Techs., Inc.*, 326 N.L.R.B. 46, 46 n.1 (1998) (to reopen the record and introduce newly discovered evidence, the movant must "show facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence") (quoting *Owen Lee Floor Service*, 250 N.L.R.B. 651 fn. 2 (1980)). The General Counsel and Local 31 cannot meet these criteria.

1. *The General Counsel And Local 31 Cannot Demonstrate That Introduction Of Additional Documents Would Alter The Outcome.*

In this case, Judge Amchan ruled against CNN and in favor of the General Counsel and the Charging Parties on *every issue*. Accordingly, even if the subpoena proponents obtained additional documents from CNN that supported their claims, those documents would not alter the outcome of a case decided entirely in their favor. The Board has repeatedly refused to reopen the record in these circumstances. *See The Tampa Tribune*, 351 N.L.R.B. No. 96, slip op. at 1 n.1 (2007) ("Because we conclude that the [r]espondent violated the Act as alleged based on the evidence already in the record, we need not reach the General Counsel's subpoena request, and we find moot the related motion to reopen the record."); *In Re Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 251, 251 n.1 (2000) (denying motion to reopen the record because "the evidence sought to be adduced by the respondent, even if credited, would not require a different result"); *Pacific Bell v. Telecommunications Int'l Union*, 330 N.L.R.B. 271, 271 n.1 (1999) (affirming ALJ's decision refusing request to reopen case because respondent could not demonstrate that the additional evidence "would not require a different result in this case"); *Modern Drop Forge*

Co., Inc., 326 N.L.R.B. 1335, 1335 n.1 (1998) (refusing to reopen the record because the evidence "would not require a different result"); *Contemporary Guidance Servs.*, 291 N.L.R.B. 50 (1988) (denying "[r]espondent's motion [to reopen the record] on the ground that the [r]espondent has not shown that the admission of the evidence in question would require a different result in this case."); *Seder Foods Corp.*, 286 N.L.R.B. 215, 216 (1987) (denying request to reopen record because "there is no showing that it would require a different result in this proceeding"); *Sturges Co.*, 74 N.L.R.B. 1546, 1549 n.9 (1947) (finding issue of respondent's subpoena moot because ALJ found in favor of respondent on underlying charges).

2. *The General Counsel And Local 31 Did Not Exercise Reasonable Diligence To Obtain Additional Documents During The Hearing.*

As explained above, neither the General Counsel nor Local 31 requested that Judge Amchan adjourn the trial, delay his ruling, or hold the record open until the conclusion of the District Court enforcement proceedings. Such action by an ALJ is not uncommon in Board proceedings, and was available to the subpoena proponents as a means potentially to obtain additional documents from CNN before the record closed and the subpoenas became moot. *See NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 112 (5th Cir. 1982) (noting that trial had been suspended indefinitely until federal courts ruled on the enforceability of the subpoenas); *Winn & Lovett Grocery Co.*, 115 N.L.R.B. 1676, 1680-81 (1956), (adjourning trial for more than a year to allow General Counsel to seek enforcement of subpoenas in federal court). Rather than taking steps during the trial to actually procure the documents they now claim they need, however, the General Counsel and Local 31 instead used the pending subpoenas as a threat, requesting that Judge Amchan impose evidentiary or other sanctions against CNN for its alleged refusal to

comply with them.[8] Merely requesting sanctions, without a timely attempt to enforce the subpoenas and obtain additional documents, does not demonstrate reasonable diligence.

The General Counsel and Local 31 had ample opportunity to seek enforcement in District Court of the subpoenas and Judge Amchan's order requiring CNN to turn over documents for *in camera* review, but delayed doing so until very late in the proceedings. After Judge Amchan issued his directive regarding *in camera* review on March 10, 2008, some four months prior to the conclusion of the trial, both Judge Amchan and CNN repeatedly advised the General Counsel, beginning on the very day that Judge Amchan ordered the documents delivered to him, that it should go into District Court if it wanted to enforce that order. *See* Hearing Tr. 3/10/2008 at 7,683 (MR. FASMAN: "[I]f the board wants these documents and feels they're essential, there is a District Court, it can go and enforce the subpoena against us."); 3/10/08 at 7,686 (MR. FASMAN: "The appropriate way for them to do this is go to District Court." JUDGE AMCHAN: "If you want to, why don't you just do that.[sic]"); 3/10/08 at 7,688 (MR. FASMAN: "I think the right course for the board, if you want documents on our privilege log, is to go to District Court and have the District Court review this."); 3/12/08 at 8,078-79 (MR. FASMAN: "Let's take Friday to go to District Court and argue it out, you want to go to District Court let's go, I'm ready. . . . Draft some pleadings and we'll meet you down there, 500 Pearl." JUDGE AMCHAN: "I think that is right about whether they are complying with the subpoena, I think your move is to go to District Court, if you really want that stuff.").

[8] Judge Amchan ultimately refused to issue specific sanctions against CNN, although as noted above and discussed in Section IV, *infra*, he did repeatedly rely in his decision upon CNN's failure to produce documents as grounds for concluding that CNN violated the Act.

Indeed, CNN encouraged the General Counsel to seek relief in District Court by offering to waive any argument that the General Counsel was obligated to exhaust administrative remedies before instituting proceedings in federal court to enforce Judge Amchan's order:

> JUDGE AMCHAN: . . . What about Mr. Fasman's point, what is it that prevents you from going to District Court[?]
>
> MS. FOLEY: It's my understanding that the people who are handling the District Court work have said that we must exhaust our remedies before the board.
>
> MR. FASMAN: I don't think that is right, Judge. There is no exhaustion requirement. If they want to go into District Court while the special appeal is pending before the board, we are not going to raise an exhaustion defense.
>
> MS. FOLEY: Very good.
>
> JUDGE AMCHAN: That takes care of that.

Hearing Tr. 4/7/08 at 9916; *see also* 4/7/08 9,921 (MR. FASMAN: "It's up to the [B]oard how they want to proceed with their case. As I said, we are not going to assert an exhaustion defense.") Despite this offer, the General Counsel waited more than two additional months before even attempting to enforce the *in camera* review order.

Of course, in mid-June the General Counsel did eventually file an action in federal court seeking to enforce the Board's order of May 9, 2008, which affirmed Judge Amchan's order requiring CNN to turn over documents on its privilege logs for *in camera* review. But it did not file that action until June 19, three months after CNN and Judge Amchan urged it to take appropriate steps to enforce the subpoenas, and well more than a month after the Board issued its May 9 Order. By that time, the Board had established the Special Master process to determine the enforceability of the subpoenas, and District Judge Sullivan stayed the federal court action pending a ruling from the Board on the enforceability of the subpoenas. *See* Transcript of

District Court Proceedings, August 12, 2008, at 14. (Attached as Exhibit 3.)[9] If the General Counsel had gone to District Court in March or April, immediately after Judge Amchan originally ordered CNN to turn over documents for *in camera* review and well before the Special Master process was created, a decision could have been issued by a federal judge while the trial was in progress. Of course, this would have subjected the subpoenas to judicial review,[10] a review that the General Counsel has steadfastly attempted to avoid.

Therefore, even if the dispute over the production of additional documents listed on CNN's privilege log was not rendered legally moot once the trial ended and the record closed, the dispute is rendered practically moot by the inability of the General Counsel or the Charging Parties to reopen the record and introduce additional evidence. With respect to the production for *in camera* review of privileged documents, the Board should declare this matter moot and rule that CNN has no future obligation to produce documents or information in response to any trial subpoena.[11]

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[9] Because the Board had by then created a process to decide the enforceability of the subpoenas at the administrative level, CNN argued, and Judge Sullivan agreed, that the General Counsel had to exhaust its administrative remedies with respect to the enforceability of the subpoenas *vel non*. Prior to May 30, 2008, no such administrative process existed and the General Counsel therefore had no need to "exhaust" such remedies. Moreover, even if it did have such a need, that need was resolved on May 9, 2008, when the Board issued its order. Even then the General Counsel did not pursue the matter for another six weeks.

[10] *See EEOC v. Ford Motor Co.*, 26 F. 3d 44, 47 (6th Cir. 1994) (district court "may not enforce an administrative subpoena unless the request seeks relevant material and is not unduly burdensome"); *Dow Chemical Co. v Allen*, 672 F. 2d 1262, 1266 (7th Cir. 1982) ("Congress intended that judges should not merely rubber-stamp the [agency] subpoenas that come before them").

[11] The General Counsel's lack of diligence in pursuing these documents requires this result even if the Board reverses Judge Amchan on the merits, as Judge Amchan's decision must rise or fall on the basis of the record before him at the time of his ruling. *See* discussion *infra*, at V.A. and cases there cited. In the event the Board reverses and remands for further proceedings, the General Counsel, like any litigant, has the authority to issue subpoenas for the production of (continued...)

IV. THE BOARD SHOULD RESOLVE CNN'S SPECIAL APPEAL BY RULING THE SUBPOENAS UNENFORCEABLE.

From the Special Master's perspective, the only remaining dispute in this matter is whether CNN must turn over privileged documents for *in camera* review. As CNN has explained above, however, any dispute over the future production of additional documents is moot and Judge Buxbaum's decision is inconsistent with his mandate and ought to be rejected outright. The potential production of privileged documents, however, is *not* the only dispute here; CNN's Special Appeal of Judge Amchan's order enforcing the subpoenas remains unresolved. CNN submits that Judge Amchan committed a serious error in enforcing the subpoenas as originally propounded, and that his decision on the merits is unenforceable because, *inter alia*, he imposed decisional sanctions on CNN based on its alleged failure to produce documents in response to the improper subpoenas.

This error must be addressed by the Board. Typically a party raises such an error in its exceptions to the Administrative Law Judge's decision and recommended order, and CNN surely intends to do just that. But in this case, CNN already has taken, and the Board already has granted and considered at length, a Special Appeal of Judge Amchan's ruling. CNN submits that under the Board's Rules and Regulations, the Board must issue a final order on the enforceability of the subpoenas in the context of that Special Appeal. Without such a ruling, the Board will not be in a position to address Judge Amchan's decision on the merits, insofar as he grants the General Counsel decisional sanctions by relying upon CNN's alleged failure to produce records as evidence of discriminatory intent. In its May 30, 2008 order granting CNN's Special Appeal, the Board found "plausible" CNN's argument that the subpoenas were unduly burdensome as to

(...continued)
documents that are relevant to the matter and which conform to normal standards of burden and overbreadth.

the production of electronically stored information and effectively vacated Judge Amchan's order enforcing the subpoenas. The Board should confirm that decision in this proceeding.[12]

In its May 30 order, the Board outlined the steps required to decide this issue. The Board found that it is "necessary to strike a balance between the competing interests of the parties in the relevancy and necessity of the information and the potential cost and burdensomeness of its production in the form requested. We find that such a balance can best be struck by applying the Federal Rules of Civil Procedure and utilizing *The Sedona Principles* as a useful structure for analysis." *CNN America*, 352 N.L.R.B. No. 85, slip op. at 2. Even though Judge Buxbaum refused to perform such an analysis, CNN submits that the record contains ample unrebutted evidence for the Board itself to conduct this balancing test and decide the appeal by finding that the subpoenas impose an unwarranted burden on CNN.[13] Although CNN already briefed the unenforceability of the subpoenas for the Board in its Memorandum Of Law In Support Of Appeal Of Denial Of Petitions To Revoke Subpoenas, December 6, 2007 ("CNN's Memo of Law in Support of Appeal") (attached hereto as Exhibit 4), CNN will briefly summarize those

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[12] Because this is the first case involving the General Counsel's wholesale demand for electronic discovery in Board proceedings, CNN suggests that the Board use this opportunity to apprise litigants – including the General Counsel – of its views as to the proper scope and limits of electronic trial subpoenas in Board litigation. What happened in this case should never be repeated in future Board litigation, yet if the Board accepts the after-the-fact "withdrawal" of the subpoenas and never issues a final ruling on their enforceability, the General Counsel will have every reason to repeat an abusive litigation tactic that would never be allowed in court.

[13] Alternatively, the Board could remand the proceedings back to Special Master Buxbaum with more specific instructions about the scope of his mandate. Insofar as the Special Master has demonstrated his unwillingness to consider CNN's arguments seriously, and in fact roundly criticized CNN for reminding him what the Board ordered him to do, CNN does not seek a remand to Judge Buxbaum. The Board could remand to another Special Master, but such a process would consume an inordinate period of time. Accordingly, CNN suggests that the Board act on the record as it stands, which contains extensive evidence of the burdensomeness of the subpoenas which never has been rebutted.

arguments here for the Board's convenience, and place those arguments in the context of the applicable balancing test.[14]

A. The Applicable Sedona Principles.

CNN believes that the following Sedona Principles should guide the Board's analysis of the cost and burdensomeness of the subpoenas:

- Principle 2 – "When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy."

- Principle 6 – "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."

- Principle 8 – "The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities."

[14] CNN incorporates by reference all of the arguments made in its Memo of Law in Support of Appeal (Exhibit 4), and urges the Board to consider all of them, whether mentioned in the summary discussion in this Brief or not.

- Principle 9 – "Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information."

- Principle 11 – "A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information."

B. Application of These Principles.

1. *CNN Has Amply Demonstrated Undue Burden.*

In support of its Request for Special Permission to Appeal, CNN addressed the cost of compliance with the General Counsel's Subpoena as written, and as enforced by Judge Amchan. In particular, CNN submitted a declaration from Stuart Hanley, a well-known electronic evidence consultant employed by Kroll Ontrack, the foremost electronic discovery provider in the country. Mr. Hanley, based upon a detailed analysis of the Subpoena's requirements and his own expertise in the field, concluded that compliance with the Subpoena would cost CNN in excess of $8 million, excluding legal fees that would accrue for inspecting documents for privilege and confidentiality. For the Board's convenience, a copy of Mr. Hanley's declaration, and its attachments which show how he derived the cost figures in question, is included within Exhibit 4 to this brief (as Exhibit G to Exhibit 1).

Significantly, the General Counsel offered no rebuttal to this evidence. It chose to submit no counter-expert to show that compliance with the Subpoena as written would cost less, or involve less disruption. The General Counsel sought to dismiss this evidence as speculative, but even a cursory review of Mr. Hanley's Declaration shows that it is anything but speculative. His careful analysis of the cost of complying with the Subpoena stands unrebutted in the record.

Indeed, this is the only evidence in the record as to burden, and standing alone it is enough to prove that the Subpoena as written was a gross abuse of prosecutorial discretion. Given the record as it stands, and as it stood when the Board addressed this issue in its May 30, 2008 order, it is small wonder that the Board found CNN's objections on undue burden "plausible." This Declaration is ample evidence that the Subpoena as written, and as enforced by Judge Amchan, was grossly overbroad and unduly burdensome, and thus unenforceable. The Board should so rule.

2. *The Subpoena is Unenforceable Based Upon Its Overbreadth.*

CNN already has briefed the technical reasons for the Subpoena's unenforceability at length and hereby submits only a brief summary of the principal arguments on this point. CNN refers the Board to its initial briefing on the unenforceability of the Subpoena for additional detail.

a. The Subpoena's Requests For "All Electronic Mail," "All Word Processing" Files, And "All Electronic Data Files" Are Unduly Burdensome.

The General Counsel's Subpoena requires that CNN review and produce the following electronic files, if the file contains any information about – or even a mere reference to – the Bureau Staffing Project:

- "All electronic mail (email and text messages) and information about email (including message contents, header information and logs of email usage)" "sent or received by computer, blackberry, and/or cell phone," for a list of more than eighty people, including current and former employees, as well as some people who have never been employed by CNN (Request 2);

- "All word processing . . . files, including prior drafts, "deleted" files, and file fragments" (Request 6); and

- "All electronic data files, "deleted" files, and file fragments created or used by spreadsheet, presentation, media or diagramming programs" (Request 7).

Even if CNN were to collect, filter, process, and produce active e-mail files and other electronic information only from the 81 persons named in Request 2 of the Subpoena, the burden would be enormous. As set out in Exhibit 2 to Mr. Hanley's declaration, he estimates that for this portion of the Subpoena alone, compliance would cost between $400,000 and more than $800,000, without regard to the time for attorneys to review the information before production. To forensically analyze just one hard drive for deleted files and file fragments – which the Subpoena instructions require – would cost $3,300 and take at least a week; the number of hard drives on which potentially relevant information might exist is likely more than a hundred. *See* Hanley Decl. ¶ 10. These requests thus violate Sedona Principles 2, 8, and 9.

b. The Subpoenas Request Wholly Irrelevant "Metadata."

Instruction E of the Board Subpoena states in pertinent part that electronically stored information "is requested in its native form, with all metadata and attachments intact." Instruction 2.c. to the Local 31 subpoena states that CNN "is required to produce all Metadata (Embedded Metadata, System Metadata, and Substantive Metadata) generated during the creation, modification, or storage of the Electronically Stored Information." Under emerging standards of electronic discovery, there is a presumption against the production of metadata, information about an electronic document that is embedded in or associated with the document and which typically is not relevant. *See, e.g.*, *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) ("Most metadata is of limited evidentiary value, and reviewing it can waste litigation resources."); *Jackson Hosp. Corp.*, 2007 N.L.R.B. LEXIS 69, at 28 (Feb. 22, 2007) (quashing subpoena as there was "an absence of either claimed or apparent relevancy" of metadata). In the instant case, there is no conceivable relevance of metadata to CNN's alleged violations of the Act, and there is no justification to saddle CNN with the burden of providing "all metadata" for all electronically stored information. Because these requests for metadata

infect every one of the requests in the subpoenas, they are entirely unenforceable. *See also* CNN's Memo of Law in Support of Appeal, at 37-39.

c. The Requests For Production Of All Electronically Stored Information In "Native Format" Are Improper.

The Definitions and Instructions in the Board Subpoena require production of all electronically stored information "in its native format."[15] The "Instructions" section of the Local 31 subpoena asks for production of all electronically stored information in its "native file," defined by Local 31 as "electronically stored information in the electronic format of the application in which such ESI is normally created, viewed and/or modified." But as the NLRB recognizes, the "most widely used" format for production is not native format, but an image-based format such as Tagged Image File format (.tiff) or Portable Document Format (.pdf). *See* Office of the General Counsel, Memorandum GC 07-09 (June 22, 2007) ("General Counsel Memo"), at 10-11. Because of the significant technological and evidentiary disadvantages posed by native format production, these image-based formats are generally favored over native format.[16] *See id.* at 3. In the absence of any justification for a wholesale native format production, which neither the General Counsel nor Local 31 has offered, such requests render the subpoenas enforceable. *See also* CNN's Memo of Law in Support of Appeal, at 33-37.

[15] "Native format" is the default file format of a given software application, such as Word, Excel, or PowerPoint.

[16] For example, information produced in native format is difficult to Bates number, rendering it unwieldy to keep track of what is produced or to reference any document within a production. General Counsel Memo at 11. Native format also hinders the redaction of privileged information. *Id.* A document and its related metadata can be altered by the recipient of the native format production simply by opening the document in its native software, potentially causing spoliation of the evidence and resulting disputes. *Id.*

d. The Restoration Of Backup Tapes Is Unduly Expensive And Burdensome, And Not Justified In This Matter.

CNN explained to the Board, and then again to the Special Master, why it should not be required to restore and produce information from disaster recovery backup tapes. *See* Memo of Law in Support of Appeal, at 23-28; Position Statement, at 10-14. The Special Master considered Sedona Principle 8, which states that "the primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes . . . requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources." Report and Recommendations at 13 n. 21 (quoting *Sedona Principle* 8). With respect to the subpoenas' demand for production from backup tapes, Judge Buxbaum found that "the General Counsel has not provided any evidence establishing that the costs and burden of producing such material is outweighed by the need for, and relevance of, any items being sought from such secondary sources of electronically stored information." *Id.* CNN agrees with this conclusion, which shows once again that the subpoenas as written are unenforceable and improper.

V. THE BOARD SHOULD REJECT OR CORRECT EACH OF THE FIVE INDIVIDUAL RECOMMENDATIONS.

Should the Board decline to reject the Report and Recommendations outright, and decline to resolve the Special Appeal by finding the subpoenas unenforceable for all of the reasons set forth above, the Board at a minimum must address Judge Buxbaum's Report and Recommendations in detail and as written. In that event, CNN provides the following comments addressing each portion of that decision. CNN submits that Recommendations #1, #4, and #5 contained in the Special Master's decision should be rejected in their entirety. If the Board accepts Recommendations #2 and #3, it must correct the analysis applied to the narrowed

demands now made by the General Counsel and Local 31, and find those portions of the subpoenas unenforceable.

A. The Board Should Reject Recommendation #1.

In Recommendation #1, Judge Buxbaum recommends that the Board "[a]ccept the General Counsel's withdrawal" of all but four paragraphs of the Subpoena. Report and Recommendations at 16. This Recommendation should be rejected because it is based on a faulty premise, *i.e.*, that the General Counsel has "withdrawn" the balance of the Subpoena. In fact, the General Counsel has never agreed to withdraw the Subpoena in whole or in part. There thus remains a live controversy as to the viability of the entire Subpoena.

The General Counsel has never stated that it is withdrawing the Subpoena – in fact, the General Counsel was very careful *not* to so state.[17] Throughout both the trial and subpoena enforcement proceedings the General Counsel has insisted that the subpoenas should be enforced as propounded. As recently as in its October 23, 2008 Position Statement to the Special Master, a full three months after the trial ended, the General Counsel stated that "CNN has failed and refused to supply materials responsive to each and every paragraph of the Subpoenas." General Counsel Position Statement to Special Master Buxbaum, October 23, 2008, at 1. Indeed, as discussed above, the General Counsel on several occasions demanded and obtained adverse inferences and other sanctions against CNN for its alleged failure to comply with the subpoenas. The suggestion that CNN still had an unfulfilled obligation to respond to "each and every

[17] By contrast, Charging Party Local 31 expressly withdrew its subpoena except to the extent it overlaps with the Board's Subpoena. *See* Report and Recommendations at 3, n.5. However, Local 31 has not articulated what portions of its subpoena remain and what portions are withdrawn. Local 31 also has not explained to what extent, if any, its subpoena would require CNN to provide it with the same materials now sought by the General Counsel. Therefore, Local 31 has failed to demonstrate its entitlement to this privileged information.

paragraph of the Subpoenas," and the General Counsel's steadfast refusal to withdraw the Subpoena, explains why CNN briefed in its position statement to Judge Buxbaum the enforceability of the entire Subpoena, and not just the enforceability of the four paragraphs that the General Counsel focuses on now. It thus was not "hypothetical," as the Special Master suggests (Report and Recommendations at 5), for CNN to address the enforceability of the entire Subpoena.[18]

More importantly, Judge Buxbaum's characterization of the General Counsel's position as a "withdrawal" is error because it is far too late now for the General Counsel voluntarily to withdraw selected parts of the Subpoena. Judge Amchan enforced the Subpoena in its entirety, and CNN placed the validity of Judge Amchan's ruling squarely before the Board. CNN is entitled to a ruling on the order it appealed, not some other proposition to carve up the Subpoena into discrete parts that the General Counsel came up with later and which was never ruled on by Judge Amchan. Any other conclusion would deny CNN its right under Section 102.26 of the NLRB Rules and Regulations to appeal Judge Amchan's order, which it pursued in a timely fashion and has never abandoned. Because the Board has never finally overturned Judge Amchan's order, there is still a ruling on the books by Judge Amchan that the entire Subpoena is

[18] Judge Buxbaum noted that the notions of "administrative efficiency" and "common sense" (Report and Recommendations at 5) are not served by continuing to address the enforceability of an oppressive, overly broad 243-paragraph trial subpoena at this stage of the proceedings. But such review is required because the General Counsel and Local 31 refused to withdraw their subpoenas long ago during the trial, especially after the Board granted CNN's Petition for Special Permission. Instead, the General Counsel and Local 31 throughout and well after the trial continued to cling to the subpoenas and continued to threaten CNN, seeking and ultimately obtaining sanctions against it. Their stubborn insistence on the validity of the subpoenas during the trial, and their successful requests for decisional sanctions based on the subpoenas, created the controversy that continues to this day.

enforceable (a ruling that affected Judge Amchan's decision on the merits), and CNN's Special Appeal of that ruling remains pending and unresolved.

Furthermore, because this is a trial subpoena, it cannot be re-drafted and partially withdrawn after the conclusion of the trial, after it has been enforced, after the trial judge has issued a ruling, and after the proceedings have been transferred to the Board. It would be ludicrous, for example, for the General Counsel to be allowed to withdraw an improper subpoena *ad testificandum* well after the trial had closed. That the instant Subpoena sought documents makes no difference. If the Subpoena was to be withdrawn and replaced with a more limited demand, that needed to take place at the trial level, and not now in the course of appellate proceedings.

This result also follows from basic principles of federal appellate practice. Rule 10(e) of the Federal Rules of Appellate Practice precludes a party from altering the record on appeal, or adding materials to the record that were not before the district court. The purpose of this rule "is to ensure that the record on appeal accurately reflects the proceedings in the trial court (thereby allowing [the appellate court] to review the decision that the trial court made in light of the information that was actually before it)..." *United States v. Elizalde-Adame*, 262 F. 3d 637, 641 (7th Cir. 2001); *Hoover v. Blue Cross and Blue Shield of Alabama*, 855 F.2d 1538, 1543 n.5 (11th Cir. 1988) ("the purpose of Rule 10(e) is to ensure that the record on appeal 'truly discloses what occurred in the district court.'") (quoting Fed. R. App. P. 10(e)). Just as neither party is allowed to supplement the appellate record to "add new material to the record in order to collaterally attack the trial court's judgment," *Elizalde-Adame*, 262 F.3d at 641, neither party can, at the appellate level, alter the trial record through withdrawal of a subpoena or alteration of the pleadings themselves. Indeed, the Board has repeatedly held that even at the trial level a

party cannot amend its pleadings at the close of the hearing to state a new theory and thus change the manner in which the case had been tried.[19] It is even more apparent that at the appellate level, no party may amend or withdraw its pleadings (including a subpoena) which were in place during the trial, particularly where that pleading had an impact upon the conduct of the trial and indeed had an impact upon the decision on the merits. Yet that is precisely what Judge Buxbaum recommends that the Board order.

Alternatively, in the event the Board for some reason is inclined to accept Recommendation #1, the proper procedure is not for the Board to allow an after-the-fact "withdrawal" of selected parts of the Subpoena. Rather, because the General Counsel tacitly concedes the unenforceability of the balance of the Subpoena by not seeking its enforcement, the Board should resolve the pending Special Appeal by declaring the Subpoena, excluding the four enumerated paragraphs, to be unenforceable.

B. The Board Should Correct The Analysis Applied To Recommendations #2 And #3.

In Recommendations #2 and #3, Judge Buxbaum recommends that the Board accept the General Counsel's and Local 31's limitation of the additional documents now being sought from

[19] *See Stagehands Referral Servs., LLC*, Nos. 34-CA-10971, 34-CB-2774, 2006 WL 2559825 at *8 (Aug. 31, 2006) (denying General Counsel's motion to amend the complaint where motion was made only after the witnesses had testified rather than when the evidence "came to light"); *NY Post Corp.*, 283 N.L.R.B. 430, 431 (1987) (reversing decision of judge where judge erroneously allowed counsel for the General Counsel to amend complaints on the last day of hearing where counsel provided no explanation as to why counsel waited until the last minute to move for amendment); *Consolidated Printers*, 305 N.L.R.B. 1062, 1064 (1992) (affirming judge's ruling denying counsel for General Counsel's post-evidentiary amendment because General Counsel did not explain the delay and holding that delay was "of consequence" given that respondent had presented its defense); *Westar Marin Servs.*, No. 20-CA-24340, 1992 WL 1465472 (Oct. 20, 1992) (finding motion to amend untimely where counsel for the General Counsel offered no mitigating circumstances to excuse the decision of waiting to move to amend the complaint until almost the very end of the hearing, after the General Counsel had rested and the Respondent had already presented a substantial part of its case).

CNN to "the documents and electronically stored information listed on CNN's Revised Privilege and Redaction Logs, dated February 29, 2008," that are responsive to paragraphs 26, 36, 40, and 43 of the Subpoena. CNN submits that, if these recommendations are accepted by the Board, it must correct the faulty analysis that Judge Buxbaum applied to the General Counsel's and Local 31's demands. Even if only these four paragraphs of the Subpoena are still in play, the Board must consider the enforceability of those paragraphs as propounded by the General Counsel, by assessing the burden of complying with those paragraphs in their entirety, as to both privileged and non-privileged documents. It is not enough to consider, as the Special Master did, the burden on CNN of producing only the documents responsive to those paragraphs that are itemized on CNN's privilege and redaction logs.

This follows because unless the four paragraphs of the Subpoena are enforceable as written, CNN has no obligation to produce *any* documents in response to them. If CNN has no obligation to produce any documents whatsoever in response to those four paragraphs, then it has no obligation to provide a privilege log justifying the withholding of certain documents that otherwise would have to be produced.[20] In other words, the General Counsel's request that CNN provide certain privileged documents to a judge for review must be predicated on an enforceable subpoena obligation to produce responsive documents in the first place. The General Counsel cannot pretermit any inquiry into whether these four paragraphs of the Subpoena themselves are enforceable by saying "I want only the privileged documents."

[20] Of course, CNN's privilege log is not limited solely to these four paragraphs, but includes documents responsive to virtually every paragraph of the Subpoena. This is yet another reason why the Board must determine the overall enforceability of the Subpoena, and not some small portion thereof.

Determining whether these four paragraphs are themselves enforceable requires a balancing analysis as to both privileged and non-privileged documents of the sort that the Board outlined in granting CNN's Request for Special Permission to Appeal. The Special Master at the very least should have conducted that balancing analysis, but did not. Accordingly, if the Board accepts Recommendations #2 and #3, it must conduct that balancing analysis. As explained in the following Section C, that analysis leads to the conclusion that the four paragraphs are not enforceable.

C. The Board Should Reject Recommendation #4.

Special Master Buxbaum recommends that the Board find that CNN failed to meet its burden of demonstrating undue burden with respect to producing for *in camera* review those documents on its privilege logs that are responsive to the four articulated requests. But as set forth above, the proper analysis is *not* whether it is unduly burdensome to CNN to produce only those privileged documents responsive to the four paragraphs and listed on CNN's privilege logs. The proper analysis is whether the four paragraphs, as propounded in the context of the entire Subpoena, are enforceable. As CNN explains here – and as CNN demonstrated to Judge Buxbaum in its position statement – the four paragraphs are not enforceable.

First, although Judge Buxbaum states that the General Counsel has implicitly withdrawn "any demand for material on backup tapes" (Report and Recommendations at 13), he never states whether the General Counsel has "withdrawn" the rest of the "Definitions and Instructions" section of the Subpoena, and there is nothing to suggest that the General Counsel has. These Definitions and Instructions impose substantial burdens on CNN, especially with respect to the production of electronically stored information. The Special Master analyzed whether CNN should be required to restore and produce information from backup tapes as demanded by the Definitions and Instructions, and determined that it need not. Report and

Recommendations at 13, n.21. CNN agrees with that finding. But the Special Master fails to address other aspects of the Definitions and Instructions, such as the demand for production of deleted files and file fragments, which would require CNN to conduct a forensic search and analysis of hundreds of sources of electronic information. With respect to the production of electronic information in native format and with metadata intact, the Special Master improperly stepped into the role of advisor to the General Counsel by recommending that it not withdraw its request for production in that format.[21]

For reasons previously explained by CNN to the Board and to the Special Master, the Definitions and Instructions that accompany the four paragraphs of the Subpoena impose inappropriate and unenforceable obligations on CNN. CNN should not be required to produce information in native format, it should not have to produce all metadata, and it should not have to resort to expensive, time-consuming forensic searches for deleted files and file fragments. *See* CNN's Position Statement to Judge Buxbaum, November 10, 2008 ("CNN's Position Statement"), at 8-14 (attached as Exhibit 4); Memo of Law in Support of Appeal, at 22-41.[22] Because these issues surrounding requests for electronically stored information present matters

[21] The Special Master states that CNN "has not specifically raised any issue regarding the General Counsel's demand for production of metadata." Report and Recommendations at 13. That is not correct. In its Position Statement submitted to Judge Buxbaum, CNN explained that the General Counsel has not withdrawn the Definitions and Instructions section of the Subpoena – which is where the request for metadata is found – and that the failure to make such a withdrawal rendered the four enumerated Subpoena paragraphs unenforceable when read in conjunction with the Definitions and Instructions. *See* CNN's Position Statement to Judge Buxbaum, November 10, 2008, p. 14.

[22] Judge Buxbaum finds that CNN failed to provide "any specific objection to production" based on "technological issues" other than the restoration of backup tapes. Report and Recommendations at 13. That also is flatly untrue. In its Position Statement to the Special Master and the accompanying affidavit of its electronic discovery expert Mr. Hanley, CNN detailed other "technological issues" surrounding the production of electronic information called for by the Subpoena which rendered the requests unduly burdensome. *See* CNN's Position Statement at 8-10, Ex. 2.

of first impression in NLRB proceedings, the Board should squarely address and reject the position of the General Counsel that such requests are appropriate. (CNN has addressed these issues in more detail in Section IV, *supra*.)

Second, even without the Definitions and Instructions, the four paragraphs are unenforceable. The analysis of whether these requests are enforceable must balance the burden to CNN of production against the relevance of the information to the underlying dispute and the need of the General Counsel and Local 31 for the information. *See CNN America*, 352 N.L.R.B. No. 85, slip op. at 2. Specifically, based on the standard set out in Federal Rule of Civil Procedure 26(b)(2)(C)(iii), the burden and cost to CNN should be considered in light of the "needs of the case," "the importance of the issues at stake in the action," and "the importance of the discovery in resolving the issues." When this balancing test is performed, the scale tips completely against the requesting parties and in favor of CNN, because the requesting parties have *no need at all* for the information – the General Counsel and Local 31 chose to put on their case without the additional documents they now seek, and Judge Amchan ruled in their favor on every single point of law and fact and granted them full relief. Given that the General Counsel and Local 31 have absolutely *no need* for the information, and that the additional documents they seek would have no effect on the resolution of the issues, the imposition of any burden on CNN, even a slight one, is not warranted. Likewise, even assuming *arguendo* that the Special Master correctly found that the privileged documents sought by the General Counsel and Local 31 were relevant to important issues at stake in the underlying dispute, such relevance ceased to exist once the hearing ended. The documents may have been relevant in the context of an ongoing trial, but now that the trial is over and Judge Amchan has ruled in favor of the subpoena

proponents on every issue, such documents no longer carry any relevance warranting the imposition of the burden on CNN to produce them.

D. The Board Should Reject Recommendation #5.

In Recommendation #5, Judge Buxbaum recommends that the Board order CNN to "identify those items listed on its Revised Privilege and Redaction Logs that are responsive to Paragraphs 26, 36, 40, and 43 of the subpoena duces tecum and submit those items to the administrative law judge for in camera inspection." Report and Recommendation at 17. As CNN has explained, that this recommendation calls for the Board to do something it already has done. On that ground alone Recommendation #5 should be rejected.

Further, as CNN also detailed above, ordering an *in camera* review of privileged documents is outside the Special Master's mandate. The Board charged Judge Buxbaum with conducting an analysis that balanced the burden of responding to the subpoenas with the need for and relevance of the requested information. *See CNN America,* 352 N.L.R.B. No. 85, slip op. at 2. A determination of whether documents should be provided to an ALJ for *in camera* review requires a completely different analysis – and not one the Board charged the Special Master with making.

But even assuming that the issue of *in camera* production and review was before him, the Special Master failed to analyze that issue under prevailing legal standards. To require *in camera* review, the party challenging a privilege claim must articulate a good faith, "cogent basis" for its challenge to the assertion of privilege. *See, e.g., G.D. v. Monarch Plastic Surgery P.A.*, 239 F.R.D. 641, 650 (D. Kan. 2007) (party challenging privilege bears burden of establishing "a cogent basis for doubting the claim of privilege"). A privilege challenge must also be particularized, and may not broadly sweep in all documents on a log. *See SEC v. Beacon Hill Asset Mgt. LLC*, 231 F.R.D. 134, 140-41 (S.D.N.Y. 2004) (party challenging privilege must

make "a specific challenge, specifically addressing [the other party's] assertion" of privilege). Requiring less than a particularized challenge from the General Counsel and Local 31 that identifies the specific alleged deficiencies in CNN's logs would "transform the requirement of providing an index of withheld documents into an obligation to provide evidence of every element of the privilege as to every document withheld." *Id.* at 141.

This test is no different when *in camera* review is sought; the party seeking such review must present "a factual basis sufficient to support a reasonable, good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged." *In re Grand Jury Investigation*, 974 F.2d 1068, 1075 (9th Cir. 1992) (adopting test set forth in *United States v. Zolin*, 491 U.S. 554, 574-75 (1989), for *in camera* review of documents for purposes of determining if an exception to the privilege (such as the crime/fraud exception) applies).[23] Where, as in this case, a party objects to an entire privilege log and asks a judge to review hundreds of documents, absent compelling evidence of misuse of the log – which is wholly absent here – *in camera* review should be refused. *See Standard Chartered Bank v. Ayala Intern. Holdings*, 111 F.R.D. 76, 86 (S.D.N.Y. 1986) ("SCB. . . requests that I review each document in camera. Its counsel apparently believes that Ayala's counsel cannot be trusted . . . .

[23] *See also MPT, Inc. v. Marathon Labels, Inc.*, No. 04-CV-2357, 2006 U.S. Dist. LEXIS 4998 (N.D. Ohio Feb. 9, 2006) (refusing to conduct an *in camera* inspection of documents where there was no indication that privilege log listings were in error or that privilege had been frivolously asserted); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 654 (D. Minn. 2002) (challenging party must provide "a cogent basis for doubting the claim of privilege" to compel an *in camera* review); *Newport Pac. Inc. v. County of San Diego*, 200 F.R.D. 628, 634 (S.D. Cal. 2001) (refusing to conduct any *in camera* inspection in absence of proof that protection had been improperly asserted); *and see Burns v. Imagine Films Entm't*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996) ("Rule 26(b)(5) was intended to help reduce the need for an *in camera* examination of documents."); *Nishika, Ltd. v. Fuju Photo Film Co., Ltd.*, 181 F.R.D. 465, 467 (D. Nev. 1998) (*in camera* review should not be conducted "solely because a party begs it to do so" – allowing *in camera* review at whims of opposing side would defeat purpose of privilege log itself).

If this court were to review each and every document . . . for no reason other than counsel's distrust of his adversary, this courthouse could hardly function."). Neither the General Counsel nor Local 31 ever presented any factual basis to support a claim that CNN has wrongly asserted privilege protection for any document on its logs, let alone for every single document listed. The Special Master, therefore, should have denied the request for *in camera* review.

It is highly significant that the Special Master found that the level of detail included in CNN's privilege logs is completely consistent with Board guidance. Report and Recommendations at 8. Based on that finding, it was unnecessary and improper from him to recommend an order for *in camera* review of documents on the privilege log, because the assessment of whether CNN has carried its burden of establishing privilege can be made based on the information in the logs themselves. Therefore, the Board should reject Recommendation #5.

CONCLUSION

For the reasons stated above, the Board should either (1) reject the Special Master's Report and Recommendations in its entirety, or (2) reject or correct each of the five individual recommendations found in the Special Master's Report and Recommendations. Regardless of the approach taken to the Special Master's decision, however, the Board should find that CNN has no further obligation to produce any documents pursuant to the subpoenas, either to the General Counsel and Local 31, or to an Administrative Law Judge *in camera*. Further, the Board should decide the merits of CNN's appeal of Judge Amchan's order enforcing the subpoenas by declaring the subpoenas unenforceable and issuing a final order overturning Judge Amchan's ruling.

Respectfully Submitted,

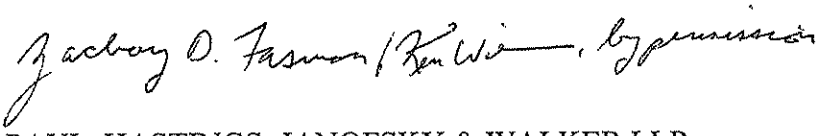

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EXHIBIT 1

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of: **CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,** Respondent, and **NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO** Charging Party.	Case No.	**5-CA-31828**
CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS, Respondent, and **NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 11, AFL-CIO** Charging Party.	Case No.	**5-CA-33125 (formerly 2-CA-36129)**

The above-entitled matter came on for hearing pursuant to notice, before **ARTHUR J. AMCHAN**, Administrative Law Judge, at **National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C.** on **Monday, January 14, 2008**, at **10:00 a.m.**

the payroll for the pay period ending --

MR. FASMAN: Your Honor, honestly I never saw it either.

MR. McCARTHY: Your Honor, we're entitled to the payroll records as respondent keeps them in the normal course of business. If we do not have the payroll records, we will argue very vehemently for an adverse inference on this with regard to this unit issue. And that issue is pending before the Board because Your Honor has ruled that, in fact, he might provide an adverse inference if documents aren't turned over pursuant to subpoena.

MS. REEVES: Your Honor, this document --

MR. McCARTHY: Just let me finish.

The General Counsel is entitled to, as Your Honor has ruled, the original payroll records as they're kept in the normal course of business, not personnel files. We have subpoenaed those, too.

Your Honor, I asked for these from Mr. Fasman way back in the investigation. And he provided a letter, which you'll see in evidence, that said they went through a lot of time, effort, and work to provide the documents to the General Counsel, not in the form that we asked for them.

We have the same issue with the native format

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of: **CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,** Respondent, and **NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO** Charging Party.	Case No.	**5-CA-31828**
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The above-entitled matter came on for hearing pursuant to notice, before **ARTHUR J. AMCHAN**, Administrative Law Judge, at **National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C.** on **Monday, January 28, 2008**, at **9:30 a.m.**

I think Mr. Willner's going somewhere else with this.

MR. POWERS: The witness wasn't --

MR. McCARTHY: So I'd like to see what the document is.

MR. POWERS: I mean, we can just asked the witness that question because, before he was able to answer it, I think he was -- he didn't answer it

JUDGE AMCHAN: Well, did you ever attend a grievance meeting where CNN -- during the life of the TVS contract, where CNN management were in attendance?

THE WITNESS: Not that I can recall.

MR. WILLNER: Well, we can skip this and save one small part of the tree.

JUDGE AMCHAN: Okay. Well, the tree's already gone. It's the record that's small.

MR. McCARTHY: Your Honor, I'm going to object on the Bannon Mills issue. You know, to the extent that documents are now surfacing with regard to TVS employees' personnel files that were not turned over by TVS, I think that rises to the level of prejudice and I'd just like to make the Court aware of that.

MR. WILLNER: Your Honor, to our knowledge, this was produced by TVS and the General Counsel has it.

JUDGE AMCHAN: Well, I'll note the objection and unless you demonstrate prejudice, I'm probably going to receive it, if it's admissible for other -- unless it's otherwise

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of: **CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,** Respondent, and **NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO** Charging Party.	Case No.	**5-CA-31828**
CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS, Respondent, and **NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 11, AFL-CIO** Charging Party.	Case No.	**5-CA-33125 (formerly 2-CA-36129)**

The above-entitled matter came on for hearing pursuant to notice, before **ARTHUR J. AMCHAN,** Administrative Law Judge, at **National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C.** on **Thursday, February 21, 2008,** at **9:30 a.m.**

CONFIDENTIAL SESSION

Q. BY MR. FASMAN: The offer was made at this figure of $70,000, right?

A. That's correct.

MS. BAUMERICH: Well, again, the General Counsel objects to this salary information remaining confidential on the record.

JUDGE AMCHAN: Right.

MS. BAUMERICH: It should be --

JUDGE AMCHAN: I understand. I understand the objection.

MS. BAUMERICH: Okay.

Q. BY MR. FASMAN: And that was what you yourself wanted, right?

A. That's correct.

Q. Do you know what your W-2 earnings have been the last three years with CNN, that is '04, '05 and '06?

A. It's been -- I couldn't tell you specifically off the top of my head, but they've been good.

Q. Let me represent for the record that in '06, your W-2 earnings were almost $133,000.

MS. BAUMERICH: I'm going to object to this.

MR. FASMAN: Why?

MS. BAUMERICH: Because you're not on the stand, and you're not under oath, and you can't testify for him.

JUDGE AMCHAN: Well, I --

MS. BAUMERICH: You can ask the witness what do you recall your W-2 earnings being. Show him something to refresh his recollection. You're not the witness, Mr. Fasman.

MR. FASMAN: How about if I finish asking my questions.

JUDGE AMCHAN: Well, yeah, but I don't think you can --

MR. FASMAN: I was going to ask him, Judge, merely whether he disagreed with that figure or if that refreshed --

MS. BAUMERICH: No, that's not, that's not appropriate.

JUDGE AMCHAN: No, you can't do that.

MR. FASMAN: It's cross-examination.

JUDGE AMCHAN: Yeah, but I think you can ask him --

MR. FASMAN: Fine. I'll ask.

JUDGE AMCHAN: -- do you recall your, you know, your W-2, your wages for last year, '06.

MR. FASMAN: '06, yeah.

JUDGE AMCHAN: In the ballpark of 130.

Q. BY MR. FASMAN: $132, 3,000. Is that about right?

A. I don't know specifically. I know almost historically every year --

Q. Charted it out.

A. Well, I just know that I sort of hover within a certain amount, and I'm --

MS. BAUMERICH: Your Honor, and I am going to further

object that this certainly Bannon Mills. We've subpoenaed the payroll records. They haven't been forthcoming, and now Mr. Fasman's going to represent he's looked at them, he knows what the W-2s are. They could provide this stuff to the General Counsel so we could see whether or not these representations are accurate.

MR. FASMAN: I'm not going to --

MS. BAUMERICH: This is totally improper.

MR. FASMAN: Your Honor, I'm not going to debate this with Ms. Baumerich except to say that they never subpoenaed them. We can go through the subpoena. They haven't asked for W-2 information for every employee, for every year thereafter, and that's just not accurate. It's not accurate.

MS. BAUMERICH: We've asked for payroll records, Your Honor, yes, we have, and they haven't --

MR. FASMAN: That's nonsense.

MS. BAUMERICH: -- been forth coming.

MR. FASMAN: Can I just see it?

JUDGE AMCHAN: Well, they have asked for payroll records.

MR. FASMAN: But not for year after year after year after year.

JUDGE AMCHAN: Well, yeah, and I'm not sure --

MS. BAUMERICH: Well, 2004, certainly we have, and 2003 certainly we have.

MR. FASMAN: 2003 we don't have. Can I ask -- can we proceed?

MS. BAUMERICH: You have -- you hired people in the beginning of December 2003. You have certain payroll records from 2003. We certainly subpoenaed 2004.

MR. FASMAN: Your Honor --

MS. BAUMERICH: They are not forthcoming and now he's going to make representations that he's looked at them and this is what they are.

JUDGE AMCHAN: Well, I think --

MS. BAUMERICH: It's so inappropriate.

JUDGE AMCHAN: -- to tell you the truth, I don't think what he -- unless you elicit what he's making now, I don't know that it's relevant to this proceeding.

MR. FASMAN: Well, he talked about -- we've heard -- let me, let me elicit it. Can we move on? I don't want to get into a sideshow debate about what the subpoena says here.

MS. BAUMERICH: I don't think it's a sideshow, Your Honor. I think it's at the heart of the case.

JUDGE AMCHAN: Well --

MS. BAUMERICH: Our theory is labor costs.

JUDGE AMCHAN: Uh-huh.

MS. BAUMERICH: And we've repeatedly made that and it's hide, hide the ball with respect to the payroll records.

MR. FASMAN: Well, if it's labor costs, then I am

entitled to ask how much he's asking.

MS. BAUMERICH: Not under Bannon Mills, Your Honor. No, he's not. He's not to elicit oral testimony when subpoenaed records have been withheld that are relevant to this case.

MR. FASMAN: Judge, you've got to make a conclusion order, and I'm more than happy to brief for you that this -- his earnings and anyone's earnings in 2006 are not in dispute.

JUDGE AMCHAN: Yeah, well, she's saying that you shouldn't be able to elicit testimony about his earnings in 2006 if we don't have the documentary evidence about evidence in 2003, 2004.

MR. FASMAN: We have, we have made available in the personnel records all of the earnings data that we have, and I'm almost positive that we don't have it. We were not asked for a W-2 final payroll record earnings. I don't think that's accurate, Judge.

JUDGE AMCHAN: I want to move on and hopefully finish Mr. Parker before lunch. Do you have a recollection of what the range or your compensation has been over the last couple of years? You said something about a range.

THE WITNESS: I have -- my salary's gone up and the range is, in terms of dollars is I think 150-ish, 140-ish --

JUDGE AMCHAN: Okay.

THE WITNESS: -- 130-ish.

MS. BAUMERICH: Your Honor, the General Counsel notes our objection to this, and our exception to this.

JUDGE AMCHAN: All right.

MS. BAUMERICH: The records that will show these are the payroll records. I've never seen a successorship case where a Respondent refuses to provide payroll records, and we are going to be seeking an adverse inference on this, Your Honor.

JUDGE AMCHAN: Okay.

MS. BAUMERICH: They are on notice of that.

JUDGE AMCHAN: Okay.

MR. FASMAN: May we proceed?

JUDGE AMCHAN: Yes.

MR. FASMAN: Thank you, Judge.

(End of confidential session.)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS

Respondents,

-and-

Case No. 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Charging Party.

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS

Respondents,

-and-

Case No. 5-CA-33125 (Formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Vol. 35

Charging Party.

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The above-entitled matter came on for hearing pursuant to Notice, before ARTHUR J. AMCHAN, Administrative Law Judge, at National Labor Relations Board, 120 West 45th Street, New York, New York on Monday, March 10, 2008 at 10:00 a.m.

documents, although Ms. Reeves wrote that I was involved in dealing with advice about issues in this litigation, I have never in my life turned over documents with regard to attorney/client matters to the trier of fact, I think it's wrong.

I also think it's reversible error, and I think the appropriate step for us to take at this point is not for you to say well, I want to see the entire privilege log. There has been no showing in my view that has been sufficient for such a ruling, number one.

And the other thing is if the board wants these documents and feels they're essential, there is a District Court, it can go and enforce the subpoena against us. We will not turn over these documents.

If you want to enter an adverse inference based on our refusal to do so, I don't know what basis there would be for that, but we are just not willing to turn over lock, stock and barrel our entire universe of privilege logs.

JUDGE AMCHAN: That makes it easy. If you're telling me you're not going to turn

If respondent would be willing to have a different judge look at them, it would be fine with me.

MR. FASMAN: I would be happy to talk with the board of this possibility. At this point, I am sure we won't do that. Let us consider that.

JUDGE AMCHAN: When are you going to let them know, then they have to decide whether they have to go to District Court.

MR. FASMAN: The appropriate way for them to do this is go to District Court.

JUDGE AMCHAN: If you want to, why don't you just do that.

MS. FOLEY: Can we have a few minutes off the record, Judge?

JUDGE AMCHAN: Sure.

(Recess.)

MS. FOLEY: We are going to ask you for a ruling, Your Honor, on the privilege log and on the redaction log. It's our understanding that we are entitled to have you review these documents, you have indicated in your discretion you are willing to do that. And Mr. Fasman is refusing to turn these over.

JUDGE AMCHAN: Yes. The ruling is, I guess I'm ordering respondent to turn over all the documents for an incamera inspection between the dates of January 1, 2003 and the end of February of 2004, that is both the redaction log and the privilege log.

MR. FASMAN: Your Honor, if I may state our position for the record, as long as we are doing this formally, it's our position that there has been no showing that would justify turning over the privilege and redaction logs in toto.

There has been no showing there is any individual documents, that there is good faith basis or cogent basis for doubting the claim of privilege.

We also have said, and I reiterate, that we are willing, of course, to have a district judge review the privilege issues, we will supply these to a district judge if the board chooses to go into District Court, and we will, of course, abide by the decision of the district judge on this issue.

But we don't think it's appropriate at this point for these to be reviewed by Your

Honor, as the trier of fact, and as I've said, the other thing that Ms. Foley asked, and I will state for the record, that if witnesses have to be recalled in the event that the district judge reviews these materials and decides that some of them are not privileged and should be turned over to the board, we will, of course, agree to the recalling of witnesses to the extent that it's necessary, based upon any information that is contained in the documents listed on the privilege log.

MS. FOLEY: Your Honor, I would also like the record to reflect that the general counsel has made an alternate proposal to Mr. Fasman to deal with his concern about the redacted and privileged, so-called privileged documents being reviewed by the trier of fact.

We have offered an alternate proposal, which it is my understanding that Mr. Fasman is not going to accept.

MR. FASMAN: That is right. We are not willing to accept that. I think the right course for the board, if you want documents on our privilege log, is to go to District Court and have the District Court review this.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,

Respondents,

-and-

Case No. 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Charging Party.

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS

Respondents,

-and-

Case No. 5-CA-33125 (Formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Vol. 37

Charging Party.

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The above-entitled matter came on for hearing pursuant to Notice, before ARTHUR J. AMCHAN, Administrative Law Judge, at National Labor Relations Board, 120 West 45th Street, New York, New York on Wednesday, March 12, 2008 at 10:00 a.m.

different things. I'm happy to show you the correspondence with Mr.Gold and Mr. McCarthy.

JUDGE AMCHAN: That was an agreement at the beginning of the case. Now the question is: Why aren't we having full days.

MR. FASMAN: It's not our fault.

JUDGE AMCHAN: They say it is.

MS. FOLEY: Why don't we have the records?

MS. RINGEL: We could have hours of testimony about subpoenaed documents.

JUDGE AMCHAN: Why don't you go to District Court and get them?

MS. RINGEL: We obviously don't have them this week, there are questions we would have anticipated asking witnesses, we would have taken far longer.

MS. FOLEY: And we would have presumed, your Honor, the privilege log would have been turned over for you to for an in-camera by you, in which case we would have had more documents. That hasn't happened and they are not conforming with Your Honor's orders.

MR. FASMAN: Let's take Friday to go

to District Court and argue it out, you want to go to District Court let's go, I'm ready.

MS. BAUMERICH: I'm ready to, then.

MR. FASMAN: Draft some pleadings and we'll meet you down there, 500 Pearl. Take the Judge.

JUDGE AMCHAN: I think that is right about whether they are complying with the subpoena, I think your move is to go to District Court, if you really want that stuff.

I will see everybody at 10 tomorrow and hear Mr. Polikoff. But I want every effort starting Monday to have full days, have a back up, somebody on deck.

See everybody tomorrow.

(Time noted: 2:35 p.m.)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,

Respondents,

-and-

Case No. 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Charging Party.

CNN AMERICA, INC. AND Team Video SERVICES, LLC, JOINT EMPLOYERS

Respondents,

-and-

Case No. 5-CA-33125 (Formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Vol. 46

Charging Party.

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The above-entitled matter came on for hearing pursuant to Notice, before ARTHUR J. AMCHAN, Administrative Law Judge, at National Labor Relations Board, 120 West 45th Street, New York, New York, on Monday, April 7, 2008 at 9:30 a.m.

withdrew his special appeal before the board then we would certainly go before the District Court.

The concerns that the region and the general counsel have, we're not willing to interrupt the board and go directly to District Court.

MR. FASMAN: It's up to the board how they want to proceed with their case.

As I said, we are not going to assert an exhaustion defense, number 1.

And number 2, as I was reminded off the record by someone smarter than I am, there is no special appeal on the privilege issue at all. We have never put in the special appeal on the issue of Your Honor's ruling, that we turn over all the privilege logs. We have never appealed that in the first place. That is not before the board.

MS. FOLEY: The bottom line is we don't have an answer right now.

JUDGE AMCHAN: I do think regardless of what you do, you would be resting subject to reopening, getting from the District Court a ruling regardless whether you go to the

happen.

MS. FOLEY: As I said this morning, your Honor, that ball is in Mr. Fasman's court. He can withdraw his special appeal. They can then go forward.

JUDGE AMCHAN: I don't understand.

I would want some representation from general counsel why can't you go to District Court with the special appeal pending and it's certainly not true with regard to the privilege log.

I am very anxious given the fact this case is now 4-1/2 years old to bring this thing to conclusion and make my decision, right or wrong, whoever is annoyed with me, probably both sides, will file exceptions.

But if we get through you put on your case in New York, they put on their case in New York, D.C. finishes its case in New York, CNN puts on its witnesses in Washington, I'm not waiting forever for you to go to District Court. If we are done by August and nothing has happened on the District Court front, I am going to say record closed, briefs in 60 days, you can expect a decision from me in 90.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,

Respondents,

-and-

Case No. 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Charging Party.

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,

Respondents,

-and-

Case No. 5-CA-33125 (Formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Vol. 48

Charging Party.

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The above-entitled matter came on for hearing pursuant to Notice, before ARTHUR J. AMCHAN, Administrative Law Judge, at National Labor Relations Board, 120 West 45th Street, New York, New York, on Wednesday, April 9, 2008 at 9:30 a.m.

it in any way from CNN, either by the court or voluntarily, you would be able to recall a witness if you had to.

MS. FOLEY: Right.

JUDGE AMCHAN: And that is correct.

MR. WILLNER: I'm assuming, if I understand it correctly, that that is documents that they don't already have, and that they could ask the witnesses about those documents, not just use that as an excuse to call someone for something else.

JUDGE AMCHAN: Correct.

Are we all on the same page?

MS. FOLEY: We are all on the same page.

The other issue I'd like to speak to you about judge is you had indicated that if we don't proceed rapidly in District Court and if we don't have the records that we feel that we're entitled to, if the District Court hasn't ruled by August, that you were going to close the record and that would necessitate our taking a special appeal.

Is that your position?

JUDGE AMCHAN: Yes. With the

caveat, if, for example, let's say we're done August 1st, and the District Court process has begun, then I would leave the record open until that was finished.

MS. FOLEY: The District Court rules, is that correct?

JUDGE AMCHAN: Right. Suppose the special appeal is denied on July 15th, you file with District Court say the next week and some poor magistrate is looking through all these documents, then I would leave the record open, but not forever, but I wouldn't close it.

But if we get August 1st all the testimony in, and your position is: We can't go because the special appeal is still pending, and nothing has happened, I'll take a special appeal on the chin.

MS. FOLEY: Got you, Judge.

Thank you, your Honor, I don't have any further clarifications.

JUDGE AMCHAN: So we are going to convene at 10 tomorrow.

MS. FOLEY: We will.

JUDGE AMCHAN: Any possibility of

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,

Respondents,

-and-

Case No. 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Charging Party.

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS

Respondents,

-and-

Case No. 5-CA-33125 (Formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO,

Vol. 50

Charging Party.

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The above-entitled matter came on for hearing pursuant to Notice, before ARTHUR J. AMCHAN, Administrative Law Judge, at National Labor Relations Board, 120 West 45th Street, New York, New York, on Friday, April 11, 2008 at 10:00 a.m.

from 1957, and a supreme court case from 1958?

MS. FOLEY: Yes.

JUDGE AMCHAN: Do you want to hear my somewhat arrogant response?

MS. FOLEY: I do.

JUDGE AMCHAN: They are a bunch of old cases from two circuits. Totally different circumstances than we have here. That is, you have a deadlocked board that either is unable or unwilling to rule on the special appeal, and I am left with the option of holding the record open until sometime in 2009 or '10 or deciding this case that has been pending for four and a half years.

I think the situation is sufficiently distinguishable and general counsel ought to seek enforcement anyway. In addition to which CNN has not filed a special appeal with regard to my ruling on the privilege log. And I know that, other things being equal, you don't like to do things piecemeal, but I just think this is an extraordinary situation.

And if I get reversed, I get reversed, but I have no intention of holding this case open until sometime next year.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:
CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,

Respondent,

and Case No. 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO

Charging Party.

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC, JOINT EMPLOYERS,

Respondent,

and Case No. 5-CA-33125
(formerly
2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 11, AFL-CIO

Charging Party.

The above-entitled matter came on for hearing pursuant to notice, before ARTHUR J. AMCHAN, Administrative Law Judge, at National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. on Wednesday, June 11, 2008, at 10:00 a.m.

PROCEEDINGS

(Time Noted: 10:00 a.m.)

MR. BIGGAR: Before I call my first witness, Your Honor, I just want for clarification purposes. Does Respondent intend to have the Special Master make any decisions about any of our objections to the documents on your privileged log or your redaction log, or is that something that you don't intend to include in that proceeding?

MR. FASMAN: I think our position has been pretty clear that we don't think it's appropriate then to handle it at the administrative level, so -- I mean -- yeah, I don't think that that's something that we see is within the Board's order, either, because they dealt with that separately in a separate order.

MR. BIGGAR: Okay. All right, General Counsel calls Mr. Peter Mohen.

JUDGE AMCHAN: Before you start that, I have something that piqued my curiosity. After we closed yesterday, I was reading through Volume 65, Ms. Larusa's testimony, looking at some of the exhibits. And I was looking at CNN Exhibit 544 and --

MR. BIGGAR: Whose testimony were you talking about, Your Honor? I didn't hear you.

JUDGE AMCHAN: I'll try to enunciate more clearly. My curiosity was piqued by something in CNN 544, which was a

EXHIBIT 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 5

CNN America, Inc, and Team Video Services, LLC,
Joint Employers,
Respondents

and

Case No. 5-CA-31828

National Association of Broadcast Employees &
Technicians, Communications Workers of America,
Local 31, AFL-CIO,
Charging Party

and

CNN America, Inc. and Team Video Services, LLC,
Respondent

and

Case No. 5-CA-33125
(formerly 2-CA-36129)

National Association of Broadcast Employees &
Technicians, Communications Workers of America,
Local 11, AFL-CIO,
Charging Party

BRIEF ON BEHALF OF THE GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE

Dorothy Foley, Susannah Ringel, Allen Rose,
David Biggar, Gregory Beatty, and Daniel Heltzer
Counsels for the General Counsel
National Labor Relations Board, Region 5

October 3, 2008

(editing one training piece, otherwise, "very limited exposure to editing."); Borland ("Ken's practical editing opportunities over the past year have been limited," but edited for CNN Espanol); De La Rosa (editing for CNN Espanol); Frederick ("most, if not all, of Rich's editing experience with CNN has been with CNN en Espanol"); Gittelman (edited two pieces apart from pieces for CNN Espanol); Imparato ("exposure to FCP has been primarily with CNN Espanol"); Phair ("while Saylor knows how to edit, she hasn't); Schang ("hasn't had any experience with editing in the past year"). **Adverse Inference:** CNN never produced the 2004 TPMP for Joe Caporarello and an adverse inference should be drawn that he did no editing in 2004, under *Bannon Mills*, 146 NLRB 611 (1964). (*See* Tr. Kinney 11529 (confirming Caporarello 2004 TPMP not included in binder).)

Nevertheless, other PJs were editing in 2004. PJs Hallsworth, Allbritton and Tambakakis apparently traveled through, and edited in, war zones and other dangerous locales in 2004. Hallsworth, 11635-50 *passim*; Kinney Tr. 11415-16; GC-380. Other FCP users included: Carroll, Coppin, Griola, Hall, Kane, Nidam, Scott, Sidki and Weiner. (Kinney Tr. 11372, 11428; GC-380.) However, as Coyte candidly admitted, there was no discipline given to any PJ who failed to become proficient with FCP. (Coyte Tr. 15570, 15651.)

Adverse Inference. The 2004 DC TPMPs cannot be reviewed for PJs because CNN did not introduce them into evidence. However, CNN did introduce some 2004 TPMPs for DC studio employees and engineers,[209] and TPMPs for PJs[210] and other positions[211] from 2005 through 2008, conveniently skipping DC PJ TPMPs for 2004. An adverse inference should be drawn that, if CNN had submitted the 2004 TPMPs for PJs, it would show that little-to-no editing was performed by DC PJs in that year. Any secondary evidence introduced by CNN in the record on this topic should also be stricken. *See Bannon Mills*, 146 NLRB 611, *supra.*[212]

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[209] CNN-407-10 (Pertz, Brown, Locisomo, Greenspan); 422 (Media Coordinators); 604-05 (Mohen); 610 (Bacheler), 623 (Miller).

[210] CNN-184-85 (Robertson), 198 (Parker), 200 (same), 569-71 (Bodnar), 581-82 (Garraty), 657-62 (Bena, George, Harlan, Littleton, Yarmuth), 670-76 (Schantz, Abdallah), 703-04 (Swain).

[211] CNN-422 (media coordinators), 606-07 (Mohen), 612-14 (Bacheler), 624-27 (Miller).

[212] CNN's attempt to portray Swain's work as typical of the photojournalists is unpersuasive. In 2004, Swain pitched, shot, wrote, edited, and produced several stories, virtually all of which aired on weekends. (Swain Tr. 16060-61.) It follows that her pieces would air on weekends they required a lot of time to put together. (*Id.* at 16063) Other than traveling to cover a hurricane (*Id.* at 16012), where she planned to edit, there is no evidence that Swain consistently worked in covering breaking news, like the rest of the D.C. bureau. Now Swain spends most of her time scheduling. (*Id.* at 16091-92)

EXHIBIT 3

88CYNLRC
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NATIONAL LABOR RELATIONS BOARD,

Applicant,

v. M-36 (RJS)

CNN AMERICA, INC.,

Respondent.

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August 12, 2008
10:00 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

NATIONAL LABOR RELATIONS BOARD
Attorneys for Applicant
26 Federal Plaza
New York, New York
KYE PAWLENKO, ESQ.,
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KEN WILLNER, ESQ.,
Of counsel

THE CLERK: Case of National Labor Relations Board,

enforceable. That is the whole concept.

If your Honor wants to rule on it, they apparently don't want you to rule on it, we are happy, Judge, if you want to look at the subpoena and say this is or is not enforceable, that's fine with us, because having practiced in this court for many, many years, I don't have any question about how that subpoena would be viewed. I haven't had the pleasure appearing before you before, but I can tell you judges in this court would have no problem with the subpoena whatsoever in terms of throwing it out.

THE COURT: Well, that may be. I mean, I don't view that as the issue before me, though I understand from your papers you say its a necessary step before I can rule on the issue that is before me, and the NLRB takes a different view.

I am going to do this:

I am going to stay this motion for at least 30 days. I would like a status letter -- I will keep it. The good news from everybody's point of view, perhaps, is I am not going to make you go shop to another Part I judge and hope that whoever gets it a month from now will take the time to figure out what it is all about and not punt it again, so I will keep it. But I would like a status letter in 30 days time, which puts us at September 12, jointly telling me what is going on with the special master and the board with respect to the enforceability of the subpoena, and then depending on what you report to me I

EXHIBIT 4

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC,
JOINT EMPLOYERS

and

Case 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES &
TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 31, AFL-CIO

and

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC,
JOINT EMPLOYERS

and

Case 5-CA-33125
(formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES &
TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 11, AFL-CIO

CNN AMERICA, INC.'S MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF DENIAL OF PETITIONS TO REVOKE SUBPOENAS

CNN America, Inc. ("CNN") appeals the denial by Administrative Law Judge Amchan of its petitions to revoke Subpoena Duces Tecum No. B-522050 ("NLRB Subpoena"), served by the National Labor Relations Board ("NLRB" or "the Board"), and Subpoena Duces Tecum No. B-441992 ("Local 31 Subpoena"), served by Charging Party National Association of Broadcast Employees & Technicians, Communications Workers of America, Local 31 ("Local 31") (collectively referred to as "the Subpoenas"). Judge Amchan denied CNN's petitions to revoke the Subpoenas on December 3, 2007. For the reasons set forth below, the Board should reverse that ruling and revoke both Subpoenas.

I. INTRODUCTION

The Subpoenas, both of which were propounded virtually on the eve of trial, seek sweepingly broad and crushingly burdensome investigative discovery of documents and electronically stored information. They violate the Board's admonition that subpoenas should be drafted carefully, narrowly, and specifically, and should seek only relevant evidence. They ignore the prohibition against conducting pre-hearing discovery in NLRB proceedings. Because the Subpoenas are so vaguely and generally drafted, the require CNN to produce materials relating to essentially every aspect of CNN's operations in New York and Washington, D.C. and, in some cases, Atlanta. And because the Subpoenas contain such broad instructions and definitions, they call for CNN to turn over information going back as far as ten years and in the possession of innumerable CNN employees in multiple different cities and locations, as well as non-CNN employees, third parties, and employees of affiliated companies.

CNN was informed that the NLRB Subpoena is the Office of the General Counsel's first attempt to conduct significant electronic discovery. Unfortunately, Counsel for the General Counsel got it wrong, and under the applicable Board rules and case law and other guidance on electronic discovery, the nature and scope of the requested electronic productions are not remotely appropriate. In fact, the Subpoenas contradict specific guidance on electronic discovery recently supplied by the Board in a Memorandum from the Office of the General Counsel. They also fail to comply with the Federal Rules of Civil Procedure, which were recently amended to address electronic discovery. And the Subpoenas are inconsistent with the seminal framework on electronic discovery – The Sedona Principles Addressing Electronic

Document Production (Second Edition, 2007).[1] Had the Subpoenas followed the guidance on e-discovery found in these sources, they would not have requested the collection and production of all "metadata," "deleted files," and "file fragments;" or production of all information in "native format;" or the wholesale restoration of "backup tapes." If CNN actually provided the Board and Local 31 with the electronic information they asked for (even if it could do so and even if the law required it to, neither of which is true), they would be drowning in a vast ocean of useless, irrelevant, inadmissible information. (And they would never be able to swim through all that information in time to use it at trial.)

In an effort to quantify the burden that could be imposed on CNN if it attempted to respond to the Subpoenas, one of the industry's most respected and experienced electronic discovery vendors estimated that the request for restoration of information from disaster recovery backup tapes could cost more than ***eight million dollars,*** take more than ***sixty-four thousand hours*** to complete, and generate ***billions of pages*** of documents. To collect and produce broad categories of e-mails and other electronic data from an enumerated list of 81 custodians in the NLRB Subpoena could cost between ***four hundred thousand dollars*** and ***eight hundred thousand dollars,*** depending on how much information was collected, processed, and ultimately produced. To process just one computer hard drive for "deleted data" and "file fragments" (keeping in mind that the requests in the NLRB Subpoena implicate ***hundreds*** of hard drives) would cost more than ***three thousand dollars*** and take ***seven days.***

[1] The Sedona Conference, which published the First Edition of the Sedona Principles in 2004, is a nonprofit legal policy research and educational organization that sponsors Working Groups on cutting-edge issues of law. The Working Group on Best Practices for Electronic Document Retention and Production is comprised of judges, attorneys, and technologists experienced in electronic discovery and document management.

These figures do not include the overwhelming number of attorney and paralegal hours that would be required to review the many millions of pages of documents that could be generated in these restoration and collection efforts. In the end, the productions demanded by the Subpoenas could cost an astronomical amount of money and require years of effort by a large team, resulting in the production of countless irrelevant documents that serve no purpose in this litigation. To call the Subpoenas "overly broad" and "unduly burdensome" fails to convey just how improper the Subpoenas are.

The NLRB Subpoena also violates the reporter's privilege under the First Amendment. The First Amendment's zealous protection of a free press prevents the government from compelling production of information about a news media organization's newsgathering function, absent a showing of extraordinary need. Here, the NLRB Subpoena demands production of information at the core of this privilege, including all documents reflecting news coverage by photojournalists. Yet Counsel for the General Counsel failed to follow any of the safeguards and prerequisites called for in the Department of Justice regulations before seeking privileged information from journalists.

The Subpoenas simply are not drafted to seek relevant, admissible evidence necessary for trial, as required by the Board's own rules. Nor do they reflect a legitimate request for trial exhibits by parties who are poised to begin trial on the merits. Instead, the Subpoenas demand vast investigative discovery – in a proceeding in which discovery is not allowed – and attempt to impose an extraordinary burden and expense on CNN. Notwithstanding the invalidity of the Subpoenas, however, CNN incurred more than $750,000 in fees and costs to voluntarily prepare and produce to the Board and to Local 31 more than 85,000 pages of documents that it had collected and segregated as relevant to the litigation. This extensive, voluntary production

should be deemed full and complete compliance with any enforceable subpoena that the Board or Local 31 might serve. For all these reasons, the Administrative Law Judge erred when he failed to revoke the Subpoenas in their entirety pursuant to Section 102.31(b) of the National Labor Relations Board's Rules and Regulations. The Board should therefore reverse these rulings and exercise its authority to revoke both Subpoenas.

II. STATEMENT OF FACTS

A. Background of the Unfair Labor Practice Charges

Until December 2003 and January 2004, CNN contracted with Respondent Team Video Services, LLC ("Team") to supply technical and broadcast support services to CNN's Washington, D.C. and New York bureaus, respectively. CNN terminated its contracts with Team at those times because it determined that it could operate more effectively and better utilize new broadcast technology by restructuring its operations, combining the work that had been contracted to Team with other functions, and hiring its own workforce to perform all of the work in question. This restructuring shortly preceded CNN's relocation in New York to the Time Warner Center in a completely new, state-of-the-art broadcast facility.

In February, March, and April 2004, two locals of the National Association of Broadcast Employees & Technicians ("NABET") that had represented Team's employees in Washington, D.C. and New York filed unfair labor practice charges against both CNN and Team alleging that: (1) CNN and Team were joint employers and, therefore, CNN's decision to terminate its business relationship with Team without bargaining with NABET was unlawful under Section 8(a)(5) of the National Labor Relations Act ("the Act") ("the joint employer claim"); (2) even if CNN and Team were not joint employers, CNN became a successor to Team and thus was obligated to bargain with NABET, which it has refused to do ("the successorship claim"); and

(3) CNN discriminated in hiring against former Team employees based upon their union membership, in violation of Section 8(a)(3) of the Act ("the hiring claim").

B. The Initial Investigation Of The Charges

Regions 2 and 5 of the NLRB extensively investigated all three claims in 2004. In response to various requests, CNN provided the Board with responsive documents. Additionally, CNN provided the Board with affidavits from nine different management level employees located in New York, Washington, D.C., and Atlanta. Both Regions sent their investigative results to Advice in the middle of 2004. In March 2005, the General Counsel informed CNN that Advice intended to issue a complaint on the joint employer and successorship claims, but remanded the hiring claim for further investigation.

C. The Re-Investigation Of The Hiring Allegations

Acting through Region 5, the Board then sent CNN additional information and document requests pertinent to the hiring claim. During the Spring and Summer of 2005, CNN provided more than 26,000 additional pages of documents to the General Counsel. Those documents included, among other things, the following:

- a copy of the most recent contracts between CNN and Team;
- a copy of the termination agreements between the two companies;
- a current organizational chart for the CNN bureau in Washington, D.C. and New York;
- a list of all current employees hired into new CNN positions, including information on the prior employer of each individual;
- payroll lists for the bureaus for December 2003 through February 2004;
- a list of all job applicants for jobs advertised by CNN for the Bureau Staffing Project;[2]
- a set of job descriptions for positions within the appropriate bargaining unit;

[2] The NLRB Subpoena refers specifically to the "Bureau Staffing Project," but never defines that term. CNN understands that term to mean the initial staffing of the Media and Technical Operations and BIT departments in CNN's Washington, D.C. and New York bureaus in December 2003 and January 2004, respectively.

- a copy of the daily overtime sheet provided to CNN by TVS-NY for November 16, 2003, showing overtime and meal penalties;
- a summary of benefit programs available to all CNN staff;
- documents describing the recruitment process utilized by CNN during the relevant time period;
- the hiring files, including resumes and applications of individuals who were interviewed as part of CNN's selection process for the Bureau Staffing Project; and
- hiring notes and summaries from CNN personnel involved in the hiring process and decisionmaking.[3]

CNN also made available approximately 300 hiring files from the Washington, D.C. and New York bureaus and offered to make available to the Board more than 5,500 resumes (1,500 in the Washington, D.C. bureau and more than 4,000 in the New York bureau) from applicants who applied for positions with CNN during the relevant time period. CNN also provided the Board with more than 150 video resumes of applicants for posted photojournalist positions, plus playback equipment to view the video resumes. Moreover, CNN's Executive Vice President for News Division Operations appeared at the Board's offices in Washington, D.C. and spent two full days with Counsel for the General Counsel preparing an affidavit discussing virtually every aspect of the hiring claim allegations.

D. The Board's Initial Investigatory Subpoena

Despite CNN's extensive cooperation during the investigation, on July 1, 2005, the Board served CNN with an investigatory subpoena, Subpoena Duces Tecum #B-45393 ("2005 Investigatory Subpoena"). The 2005 Investigatory Subpoena contained 88 paragraphs of requests, seeking numerous categories of historical information (going back in some instances to the 1980s) regarding arbitration awards with prior contractors, changes in technology, and

[3] Some of the documents identified above were redacted to exclude irrelevant, confidential, or proprietary information and/or information protected from disclosure by the attorney-client privilege.

changes in CNN's business operations, none of which was remotely relevant to the hiring claims that then were under investigation. The 2005 Investigatory Subpoena also sought confidential and proprietary information regarding CNN's business relationship with former contractors, as well as with Team, and proprietary and trade secret information regarding precisely how CNN has introduced and used new broadcast technology in Atlanta, Washington, D.C. and New York. The 2005 Investigatory Subpoena further demanded production of information that CNN had already provided to the General Counsel.

On July 18, 2005, CNN filed a Petition to Revoke the 2005 Investigatory Subpoena based on the irrelevancy and confidentiality of the information sought, the subpoena's incompatibility with the Board's Rules and Regulations, and the harassing nature of the subpoena. On August 9, 2005, the Counsel for the General Counsel filed a Response to the Petition to Revoke and referred the Petition to Revoke and the Response to the Board. CNN filed a Reply to the Response on August 31, 2005. No ruling on the subpoena ever was rendered. Instead, on March 5, 2007, Counsel for the General Counsel withdrew the 2005 Investigatory Subpoena.

E. Attempts To Narrow The NLRB Subpoena

On August 4, 2007, Counsel for the General Counsel served CNN with the NLRB Subpoena. A copy of the NLRB Subpoena is attached as Exhibit A to Exhibit 1. The NLRB Subpoena contains 243 numbered paragraphs, with additional subparts. The NLRB Subpoena includes all of the 88 requests from the overbroad 2005 Investigatory Subpoena along with more than 150 additional requests. It is the most overbroad subpoena – in terms of both the scope of the information requested and the nature of the request for electronic information – ever seen by undersigned counsel.

On August 9, 2007, counsel for CNN and Counsel for the General Counsel met to discuss the NLRB Subpoena and other pre-trial issues. CNN raised a number of concerns about the

NLRB Subpoena, particularly objecting that the NLRB Subpoena demands massive volumes of entirely irrelevant information, electronically stored information going back more than five (or in some cases ten) years, confidential and privileged information, and electronic versions of every document already produced by CNN in this case. Further, CNN informed the General Counsel that complying with the subpoena, even assuming it were possible, would take months or years and cost millions of dollars.[4] Unfortunately, the parties made little headway in resolving the problems with the NLRB Subpoena – it took longer than an hour to discuss just ***one*** of the Subpoena requests.

CNN and Counsel for the General Counsel met again to discuss the NLRB Subpoena on September 25, 2007. This time, the parties did make some progress towards a compromise, which Counsel for the General Counsel said it would memorialize in a letter. Ultimately, more than three weeks later, the General Counsel agreed to withdraw four of the 243 requests, and agreed that, for most categories of documents to be produced to the Board, the documents could be provided by CNN in electronic .tiff image format, with accompanying load files containing certain specified fields of metadata. The General Counsel also made an alternative (although still unworkable and unacceptable) proposal regarding the production of information from backup tapes. See October 18, 2007 letter from C. Baumerich to Z. Fasman, attached as Exhibit 5. However, the General Counsel refused (and continues to refuse) to withdraw the NLRB Subpoena or modify it to reflect its agreements and proposals.

[4] The General Counsel's response to CNN's claims concerning the cost and burden of complying with the NLRB Subpoena was that CNN could avoid these expenditures if it would simply recognize the union. This statement demonstrates the clearly improper purpose for the NLRB Subpoena, showing that the Board is not seeking relevant information, but is purposely and intentionally burdening and harassing CNN to leverage it into recognizing the union without regard to the employees' desires with respect to union representation.

F. The Local 31 Subpoena

On October 27, 2007, Local 31 served its subpoena on CNN. A copy of the Local 31 Subpoena is attached as Exhibit A to Exhibit 4. The Local 31 Subpoena was served on a Saturday, less than two weeks before the hearing opened on November 7. The Board actually issued the subpoena on August 10, 2007, yet Local 31 failed to serve the subpoena on CNN for more than two months thereafter. Although it contains fewer requests than the NLRB Subpoena, the Local 31 Subpoena calls for the production of voluminous documents, including a significant quantity of electronic documents that date back as far as ten years, and are possessed by innumerable employees of CNN and its sister and parent companies in multiple different cities and locations. The Local 31 Subpoena incorporates extensive "Definitions" and "Instructions," which, if followed literally, render the substantive requests of the Local 31 Subpoena even more burdensome by expanding their breadth and imposing additional production obligations on CNN. Finally, the Local 31 Subpoenas asks CNN to produce to Local 31 everything it produced to the Board in response to the NLRB Subpoena.

G. CNN's Extensive, Voluntary Document Production

During the course of the parties' attempts to compromise their disputes over the NLRB Subpoena, Counsel for the General Counsel suggested that CNN should produce the documents it had already collected and segregated as relevant to the litigation. CNN responded that this could be an acceptable alternative to the NLRB Subpoena, and on August 15, 2007, CNN sent Counsel for the General Counsel a letter agreeing to this proposal. A copy of the August 15, 2007 letter is attached as Exhibit B to Exhibit 1. CNN detailed in its letter the various categories of non-privileged documents it had already collected and segregated as relevant, and which it offered to produce. Those categories included:

- The following documents relating to the hiring for Bureau Staffing positions in Media Operations, Technical Operations and BIT departments in the New York and Washington, D.C. bureaus in December 2003 (D.C.) and January 2004 (NY):

    - the posting of positions;
    - criteria for positions;
    - job descriptions;
    - position questionnaires;
    - applicant lists;
    - communications with applicants;
    - communications with recruiters;
    - communications with others including between hiring managers;
    - phone screen notes;
    - interview notes;
    - debriefing notes;
    - reference check information;
    - salary determinations;
    - offer information; and
    - hires/start dates.

- Information from all hiring managers in D.C. and N.Y. who participated in the hiring for the Bureau Staffing positions in December 2003 and January 2004 concerning:

    - Communications between the hiring manager and any other hiring manager or recruiter relating to a candidate's qualifications;
    - Ratings sheets from the hiring debrief process;
    - The behavioral interview training materials, and any notes taken during that training;
    - Offers to the candidates; and
    - Information received from Team Video Services regarding the candidates, if any.

- Descriptive documents with respect to the reconfiguration of operations and workforce in the D.C. and N.Y. Bureaus in December 2003 and January 2004, the transition period between the termination of the TVS contract and CNN's new operations, orientation and training for the employees hired as a part of the Bureau Staffing Project, and the new operations.

- Descriptive documents with respect to implementation of new technology in the D.C. and NY bureaus since December 2003 and January 2004 respectively, and documents describing the affects of such technology and training received on the new technology by employees in the Bureau Staffing positions.

- Communications between CNN and Team Video regarding operations at the New York and D.C. Bureaus, such as shift reports, schedules, and emails regarding engineering/maintenance issues, OT, equipment issues and problems.

- Documents arising out of the relationship between Team Video Services and CNN, including the Team-CNN contracts, invoices and correspondence related to the termination of the Team-CNN contracts.

Even though Counsel for the General Counsel had originally offered this compromise proposal, the Board never responded to CNN's acceptance of it.[5]

Nevertheless, during a conference call on November 2, 2007 involving all parties and Judge Amchan, the Judge asked CNN if it was still willing voluntarily to produce the documents it previously had offered to produce to Counsel for General Counsel in exchange for withdrawal of the subpoena. CNN said that it was willing to do so, even though Counsel for General Counsel had rejected this offer months earlier.[6] Judge Amchan instructed CNN to make its voluntary production, and suggested that Counsel for the General Counsel review the production and determine if there was anything else they were looking for.

CNN then began preparing its production in accordance with the proposal in its August 15, 2007 letter. On November 6, three days before CNN's first document production to the Board, Counsel for the General Counsel requested that CNN make its production as .tiff images with accompanying "load files" compatible with Summation database software, with specified metadata, and that all documents be made word searchable. CNN's law firm does not support Summation software, so counsel at CNN's expense purchased the necessary software to convert

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[5] CNN later made the same compromise offer to Local 31. Specifically, CNN offered that, if Local 31 agreed to withdraw its Subpoena, CNN agreed to produce the relevant, non-privileged, responsive documents that it already had collected and segregated for use in the proceedings, subject to the entry of an appropriate protective order. To the extent the production included electronically stored information, CNN agreed to produce such information in .tiff image format with accompanying load files. See CNN's Petition to Revoke Subpoena B-441992, p. 2 n.1, attached as Exhibit 4. Local 31 never accepted this offer.

[6] The General Counsel made clear on the record that it has not agreed and will not agree to withdraw the NLRB Subpoena in exchange for CNN's voluntary production of documents. See December 3, 2007 Transcript, p. 110, Attached as Exhibit 6.

the files to the format requested by the Board. On November 8, CNN provided the Board with a sample load file, according to the Board's specifications, to enable Counsel for the General Counsel to test the format in which CNN would be producing documents. On November 9th, Counsel for the General Counsel confirmed that CNN's sample production was in fact loadable into Summation.

On November 9, CNN produced approximately 18,000 pages of documents to the Board in electronic form with searchable load files, as requested. CNN produced the documents by custodian and document type – the same manner in which they were maintained in the usual course of business and the same manner in which they were received from custodians by CNN. Over the next ten days, CNN continued to produce, in the same format, additional documents totaling more than 65,000 additional pages. As with the first production, each of these subsequent document productions was organized by custodian and document type. The production occurred in stages because, unlike a paper production, an incredible amount of technical work was required to produce the documents in the format requested by Counsel for General Counsel. Because the Summation software used by the Board does not automatically link e-mails with attachments, CNN had to review the entire document production and manually link e-mails to attachments and then link their corresponding metadata. This was done, at great effort and expense, to produce the documents in the specific software format requested by the Board. Moreover, notwithstanding the absence of any legal obligation to do so, in response to a request by the Board, CNN voluntarily agreed to reproduce in electronic format more than 26,000 pages of documents already provided in hard copy.

All in all, by the time testimony began in this case, CNN had produced more than 85,000 pages of documents to the Board.[7] CNN also produced these same documents to Local 31. CNN estimates that it spent well in excess of $750,000 in fees and costs to prepare and produce documents in the weeks leading up to the opening of testimony on December 3, 2007.

H. Litigation of CNN's Objections to the Subpoenas

On September 17, 2007, CNN filed a Petition to Revoke the NLRB Subpoena, attached as Exhibit 1. On October 29, 2007, the Board filed its Response, attached as Exhibit 2,[8] and on November 6, 2007, CNN filed a Reply, attached as Exhibit 3. On November 2, 2007, CNN filed a Petition to Revoke the Local 31 Subpoena, attached as Exhibit 4.

In an e-mail dated November 26, 2007, attached as Exhibit 8, Judge Amchan denied CNN's Petition to Revoke the NLRB Subpoena to the extent the petition relied on an assertion of the reporter's privilege.[9] In a telephone conference with the parties the following day, Judge Amchan stated that, unless he ruled otherwise, he considered the entirety of the NLRB Subpoena to be enforceable. At CNN's request, Judge Amchan memorialized this ruling on the record, and stated during the hearing on December 3, 2007 that he was denying CNN's Petitions to Revoke. The relevant excerpt of the December 3 Transcript (pp. 106-10, 114) is attached as Exhibit 6.

When counsel for CNN asked if he would consider sanctions against CNN for non-compliance with the Subpoenas, Judge Amchan replied, "It's possible." December 3, 2007

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[7] As of December 4, 2007, Counsel for the General Counsel had not yet completed its review of this production, and was unfamiliar with the documents it has in its possession. See December 4, 2007 Draft Transcript, pp. 88, 177, Exhibit 7.

[8] The Board's Response is attached, but not its voluminous exhibits. Should the Board want to review any or all of those exhibits, CNN will certainly provide them.

[9] Judge Amchan clarified in his e-mail that CNN may redact the names of sources which have provided it with information unrelated to the issues in this case if the information was provided on the condition that the source's identity would be kept confidential.

Transcript, p. 107. Judge Amchan has also informed the parties that he would consider decisional sanctions if CNN failed to comply with the Subpoenas.

III. ARGUMENT

CNN does not dispute the General Counsel's authority to issue a trial subpoena for the production of evidence relevant to the pending litigation. The National Labor Relations Act (the "Act") specifically grants to the Board the authority to subpoena evidence "that relates to any matter under investigation or in question." 29 U.S.C. § 161(1) (2001). The right of the General Counsel to access relevant information, however, is not without limits. "The subpoena must be for a legitimate purpose, the inquiry in question must be reasonably related to the purpose, and the demand for information must not be overly broad, indefinite or otherwise unreasonable." NLRB v. United States Postal Serv., 790 F. Supp. 31, 34 (D.D.C. 1992) (citing United States v. Powell, 379 U.S. 48, 57-58 (1964) and United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)).

In this matter, Counsel for the General Counsel grossly exceeded its subpoena power, and the Administrative Law Judge should have granted the Petitions to Revoke. But he did not, and the Board should now exercise its "supervisory authority over trial counsel and ALJs" and reverse that decision. Herrick & Smith v. NLRB, 802 F.2d 565, 570 (1st Cir. 1986). The Board is authorized to make its own determinations, and is not required to follow the findings and conclusions of the Administrative Law Judge. See Vico Prods. Co. v. NLRB, 333 F.3d 198, 211 (D.C. Cir. 2003); Mercy Hosp. of Buffalo, 336 NLRB 1282 (2001) (reversing Administrative Law Judge's credibility determination and making an independent evaluation where documentary evidence was relied upon); McLean v. NLRB, 333 F.2d 84, 88 (6th Cir. 1964) ("The Board's disagreement with the [ALJ] related to a question of law rather than one of fact

and the issue was within its competence to decide."). Accordingly, the Board should apply *de novo* review of Judge Amchan's decision.

According to Section 11 of the Act, the Board must revoke a subpoena "if in its opinion the evidence whose production is required does not relate to . . . any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required." 29 U.S.C. § 161(1); see also NLRB Casehandling Manual § 11782 (subpoena should be revoked if it "does not relate to any matter under investigation or at issue in a hearing, [or] does not describe the evidence sought with sufficient particularity").[10] A subpoena should also be revoked "if for any other reason sufficient in law the subpoena is otherwise invalid." NLRB Casehandling Manual § 11782; see also Drukker Commc'ns, Inc. v. NLRB, 700 F.2d 727, 730 (D.C. Cir. 1983) ("Although the statute explicitly permits the quashing of subpoenas only for irrelevance or lack of particularity, it does not explicitly exclude other grounds."). The Board may revoke a subpoena on any ground that is consistent with the overall powers and duties of the Board under the Act considered as a whole. See NLRB v. Interstate Builders, Inc., 351 F.3d 1020, 1028-29 (10th Cir. 2003) ("section (11)(1)

[10] Although the provisions in the Casehandling Manual are not regulations with the force of law, courts have required that the Board abide by the provisions of the Manual absent reasoned justification to the contrary. See NLRB v. Cedar Tree Press, Inc., 169 F.3d 794, 796 (3d Cir. 1999) ("While not authoritative, the [Casehandling] manual's provisions a fortiori reflect the Board's policies" and "represent the Board's reasoned policy choices") (citations omitted); Shepard Convention Servs. v. NLRB, 85 F.3d 671 (D.C. Cir. 1996) (whenever it acts in direct contravention of the Casehandling Manual, the Board departs from established policy, and such departures must be justified by compelling reasons); Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 758 n.6 (7th Cir. 1982) ("To disregard the Board's failure to apply its own rule . . . would be to sanction arbitrary action by the Board. Whatever the propriety of its decision on the . . . issue, the Board remains obligated to apply its precedent with reasonable consistency."); NLRB v. Welcome-American Fertilizer Co., 443 F.2d 19, 20 (9th Cir. 1971) ("When administrative bodies promulgate rules or regulations to serve as guidelines, these guidelines should be followed. Failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process.").

[of the Act] is not intended as a complete and inclusive catalogue of all grounds upon which a Board subpoena may be revoked") (quoting General Engineering, Inc. v. NLRB, 341 F.2d 367, 373 (9th Cir. 1965)).

In this case, the Subpoenas serve no legitimate purpose at this point in the proceedings, are grossly overbroad and burdensome, and should have been revoked in their entirety by the Administrative Law Judge. CNN now asks the Board to step into its oversight role and revoke these plainly improper Subpoenas.

A. The NLRB Subpoena Violates The Board's Own Casehandling Manual And Other Guidelines.

The Board should revoke the NLRB Subpoena because it fails to comply with the Board's own guidelines and admonitions regarding subpoenas. The Board's Casehandling Manual states that a "subpoena duces tecum ***should seek relevant evidence*** and ***should be drafted as narrowly and specifically as is practicable***." NLRB Casehandling Manual § 11776 (emphasis added). It further states that the "use of the word 'all' in the description of records ***should be avoided*** wherever possible." Id. (emphasis added). Contrary to these directives, of the 243 requests in the NLRB Subpoena:

- 222 requests begin "***All*** electronically stored information and documents";
- Another 11 begin "To the extent not covered by [a previous request], ***all*** electronically stored information and documents"; and
- Another 7 begin "***all*** metadata for ***all*** Bates stamped documents provided during the investigation;" "***All*** electronic mail" for 81 individuals (including in-house counsel); "***All*** documents" that describe CNN's document preservation, retrieval and destruction policies and procedures; "***All*** documents" submitted by CNN during the investigation; "***All*** databases" containing ***any*** reference to the Bureau Staffing Project; "***All*** word processing, including but not limited to Microsoft Word and Word Perfect files, including prior drafts, deleted files, and file fragments, containing ***any*** reference to and/or information about the Bureau Staffing Project;" and "***All*** electronic data files, deleted files, and file fragments," including but not limited to Microsoft Excel, Lotus, and Quattro Pro, where data files containing "***any*** reference

to and/or information about the Bureau Staffing Project" may be found. (Emphasis added).[11]

The Board's Casehandling Manual also states that the "Board agent should ***carefully draft subpoenas*** in order to avoid potential arguments that the subpoena constitutes a '***fishing expedition.***'" Id. at § 11796 (emphasis added). The Supreme Court has specifically cautioned against allowing "fishing expeditions" by administrative agencies: "It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up." FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924); see also Interstate Builders, Inc., 334 NLRB 835, 841 (2001) (granting petition to revoke subpoena because "most of the material sought was too speculative in nature and . . . was a fishing expedition type of subpoena"); EEOC v. University of New Mexico, 504 F.2d 1296, 1301-02 (10th Cir. 1974) (stating that "[i]t is fundamental that administrative subpoenas issued pursuant to these statutes require as much precision as is fair and feasible in identifying the records or materials sought and that they cannot be so broadly stated as to constitute a fishing expedition"). The NLRB Subpoena calls for the production of virtually "all documents and electronically stored information" in CNN's New York and Washington, D.C. Bureaus, as well as some information from Atlanta. It is the epitome of an improper fishing expedition and should not have been countenanced by the Administrative Law Judge. The Board should act now to reel in the fishing nets improperly cast by the General Counsel.

The Act and the Board's own Casehandling Manual also require that subpoenas "describe with sufficient particularity the evidence whose production is required." 29 U.S.C. § 161(1); see also NLRB Casehandling Manual § 11776 ("the subpoena should describe all documents sought

[11] Moreover, the Definitions and Instructions to the NLRB Subpoena state that "each of the words 'each,' 'any,' 'every,' and 'all' shall be deemed to include each of the other words."

with respect to content and time period"). In drafting the NLRB Subpoena, Counsel for the General Counsel ignored that admonition. As illustrative examples, the following requests are so broadly drafted that they would require the production of countless documents that have absolutely nothing to do with the claims before the Board:

> 102. All electronically stored information and documents [for the time period January 1, 2002 to the present] that indicate, show, discuss and/or mention ***the Media Operations Department (MOPS)*** in the NY and/or DC bureau and/or Atlanta bureau, including all documents that indicate the date and/or location when said department was fully operational. (Emphasis added.)
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> 232. All electronically stored information and documents [for the time period January 1, 2002 to the present] that indicate, show, discuss and/or mention, for each of the [176] individuals referenced above in paragraph 226 and set forth in the Consolidated Complaint paragraphs 4(a) and (b), all communications addressed to or sent by each of them, individually and/or collectively, concerning ***the operation and/or staffing of CNN's NY and DC bureaus***. (Emphasis added.)
>
> 233. All electronically stored information and documents [for the time period January 1, 2002 to the present] that indicate, show, discuss and/or mention, ***the meetings of CNN and the purpose of each meeting***, attended by each of the [176] individuals referenced above in paragraph 226 and set forth in the Consolidated Complaint paragraphs 4(a) and (b), individually and/or collectively. This information should include the names and positions and/or job classifications of all others who attended each meeting.[12] (Emphasis added.)

Finally, and as explained in more detail in Section C. below, the provisions of the NLRB Subpoena concerning electronic discovery countermand guidance provided earlier this year by the General Counsel in a Memorandum issued to all attorneys who may engage in litigation on behalf of the Board. See Office of the General Counsel, Memorandum GC 07-09 (June 22, 2007), ("General Counsel Memo"). In that Memo, General Counsel Meisburg explains some of the general terms and concepts in electronic discovery, and offers guidelines for identifying and

[12] Like so many of the NLRB Subpoena requests, this request asks not just for "documents," but for information that can only be obtained by reviewing and piecing together several different sources of information. These requests are more akin to interrogatories, which are improper. CNN is not required to analyze and synthesize the documents provided to the General Counsel.

producing electronically stored information. Counsel for the General Counsel flatly contradicted this Board guidance in several respects when it propounded the NLRB Subpoena. By requesting the production of information from disaster recovery backup tapes, by demanding production of all metadata, and by insisting that all electronic documents be produced in native format, the NLRB Subpoena contradicts the Board's own positions on these issues.

B. The NLRB Subpoena Improperly Seeks Pretrial Discovery.

While the Board is investigating a charge, a legitimate purpose for a subpoena is to collect information relevant to the matters under investigation. At this stage of the matter however, when the Board has completed its investigation, the General Counsel has issued a Complaint, and the trial has begun, a subpoena has only one proper purpose: seeking specific documents that the General Counsel has identified and needs to put on its case. See, e.g., Aramark Corp., 1999 NLRB LEXIS 174 (Mar. 25, 1999) (documents are subpoenaed for trial to be used in the cross-examination of witnesses); NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 857-58 (2d Cir. 1970) ("It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery [and accordingly the Board is permitted to seek information only] for the purpose of obtaining and preserving evidence for trial, not for the purpose of discovery").

The NLRB Subpoena does not seek to obtain specific documents for use at trial. Rather, the NLRB Subpoena can only be described as an attempt to obtain unlimited pretrial discovery, a practice prohibited by all relevant authority. The Board's own Casehandling Manual provides:

> The Federal Rules of Civil Procedure providing for compulsory pretrial discovery have been held not applicable to Board proceedings. NLRB v. Valley Mold Co., 530 F.2d 693 (6th Cir. 1976); Pepsi-Cola Bottling Co., 315 NLRB 882 (1994). ***Any attempt to use such discovery should be resisted.*** NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

NLRB Casehandling Manual § 10292.4 (emphasis added); see also Interstate Builders, Inc., 334 NLRB 835, 842 (2001) (granting petition to revoke subpoena because the subpoena "appears to be a fishing expedition or, at best, an attempt at pretrial discovery, which is not allowed by the Board"); Pepsi-Cola Bottling Co., 315 NLRB 882, 882 (1994) ("It is well established that the Board procedures do not include pretrial discovery."); Am-Del-Co, Inc., 225 NLRB 698, 718 n.3 (1976) ("The Board's Rules and Regulations do not provide for an essentially prehearing discovery procedure.").

In its Response to CNN's Petition, the General Counsel agreed that discovery is not permitted, see Response to Petition to Revoke at 55, yet its arguments revealed that discovery is exactly what it wants. It claimed that the NLRB Subpoena is subject to a "broad, liberal, discovery-type standard." Id. at 23. It stated that it seeks "all evidence related to the matters in question." Id. at 24. It admitted that the NLRB Subpoena "aggressively seeks 'any' and 'all' evidence that relates to the matters in question." Id. at 25. And without offering any rationale other than its desire for all relevant information – *i.e.*, discovery – the General Counsel demands to be excused from following the instruction in the Board's Casehandling Manual not to make requests for "any" and "all" documents in trial subpoenas. Id. at 25, n.42.

It is evident that Counsel for the General Counsel is using the NLRB subpoena to conduct discovery to search for proof to support the claims in the Complaint, rather than to seek specific documents for trial. For example, the General Counsel repeatedly admitted that it is trying to "test" the evidence and testimony supporting CNN's defenses, "ascertain the accuracy" of CNN's positions, and "probe" the reasons offered by CNN for its actions. See Response to Petition to Revoke at 25 (NLRB Subpoena seeks "evidence probing and challenging the technology and workflow defenses"); 64 ("The GC is entitled to test the arguments and

testimony that CNN proffered during the investigation.").[13] These statements further demonstrate that this is an investigatory subpoena, not a trial subpoena. The General Counsel issued a similar but somewhat briefer subpoena during the investigation, which it withdrew in its entirety when Advice authorized issuance of a complaint. The General Counsel cannot continue to investigate this case through a massive "trial subpoena" which in fact is nothing more than discovery. This abuse of the Board's subpoena power by Counsel for the General Counsel should have been halted by the Administrative Law Judge, and the Board should do so now.

C. The Subpoenas Inappropriately Request Electronically Stored Information.

CNN does not dispute that a subpoena may legitimately demand the production of "electronically stored information." But the NLRB and Local 31 Subpoenas stray far afield of the appropriate, reasonable, and permissible scope of production of electronically stored information. The Subpoenas blatantly disregard the guidance on electronic discovery provided to Board attorneys by the General Counsel. The Subpoenas also violate the principles set forth in the amended Federal Rules of Civil Procedure on electronic discovery and their associated commentary. Compliance with the Subpoenas would impose an unbearable burden on CNN, and would overwhelm the Board and Local 31 with mountains of useless, irrelevant electronic documents and information.

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[13] See also Response to Petition to Revoke at 66 ("A significant portion of the documents subpoenaed from CNN...probe the veracity of CNN's reasons" for its actions); 68 ("For example, subpoena paragraph 102 is drafted to ascertain the accuracy of one of CNN's business related defenses."); 69 ("The GC has a responsibility to test the accuracy of CNN's self-serving statements"); 70 (CNN's records "will disclose the accuracy of Respondents' representations"); 72 (CNN's business records are "relevant to ascertaining the accuracy of Respondents' self-serving defenses raised during the investigation"); 76 (The General Counsel is entitled to certain documents "to rebut these defenses and probe the veracity of CNN's reasons for terminating the TVS contracts"); 83 ("the GC's subpoenas probe each of the specific technology-related and workflow justifications advanced by CNN. . . and. . . assess the bona fides of CNN's asserted reasons for terminating the longstanding subcontractor relationship").

1. The Subpoenas' Requirement That CNN Restore Backup Tapes Is Unduly Burdensome And Not Justified In This Matter.

Paragraphs E and Q of the Definitions and Instructions section of the NLRB Subpoena state in pertinent part: "If [e-mail or the responsive document] has been purged or deleted from active storage at any time since **May 1, 2003**, the native format should be restored from backup tapes." (emphasis in original).[14] According to the "Definitions" section of the Local 31 Subpoena, it seeks electronically stored information found on "computer tape." However, restoring information from backup tapes could cost more than eight million dollars and take more than sixty-four thousand hours, not counting the thousands of attorney and paralegal hours that would be required to review the resulting documents, as further described below. Such a burden is not warranted in the circumstances of this case.[15]

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[14] As discussed *infra* in Section C.1.iii., the General Counsel offered a compromise proposal that it claimed would limit the scope and burden of production from backup tapes. However, the parties never reached an agreement, and the original demand in the NLRB Subpoena for wholesale backup tape restoration remains in place.

[15] According to the Board, in assessing whether a subpoena should be revoked, hearing officers should consult Federal Rules of Civil Procedure 26 and 45 for direction on the appropriate scope of subpoenas. See Brink's, Inc., 281 NLRB 468, 468-69 (1986). Rule 45(b) states that a subpoena should be quashed or modified "if it is unreasonable and oppressive." Fed. R. Civ. P. 45(b). Rule 26(b) prohibits requests for information that is "unreasonably cumulative or duplicative, or . . . obtainable from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b). Rule 26(b)(2)(C) offers protection from subpoena requests when "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." With respect to requests for production of electronically stored information, the recently amended Rule 26(b)(2)(B) provides that "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."

Backup tapes contain copies of data stored on network servers and typically are maintained for disaster recovery purposes. The Office of the General Counsel has described back-up tapes as follows:

> On a back-up tape, data is saved in the random order in which it appears on the [hard] drive, often using data compression technology. Unlike a hard drive, different spots on a back-up tape cannot be directly accessed. Therefore, the data stored on a back-up tape cannot be accessed without first loading it onto a hard drive.

General Counsel Memo at 5. At CNN, using a process intended for purposes of disaster recovery, the contents of CNN's e-mail servers and other network file servers are backed up to tape every night. See Declaration of Terry McDonald ("McDonald Decl."), attached as Exhibit H to Exhibit 1, at ¶7.

To access information on a backup tape, the tape must first be "restored." Id. at ¶11; see also General Counsel Memo at 5. As the General Counsel recognized, the process of restoring the data on a backup tape is "a time consuming and costly process." General Counsel Memo at 5. The process is so burdensome, that, as the General Counsel stated, "the current state of the law is that ***only in very exceptional circumstances is there a need to produce information from back-up tapes that exist solely for disaster recovery.***" Id. at 7 n.9 (emphasis added). Neither the Board nor Local 31 can establish that such "exceptional circumstances" exist here.

Moreover, applying the standard now set out in Federal Rule 26(b)(2)(B), numerous courts have held that information stored on backup tapes is "not reasonably accessible," and therefore not ordinarily subject to discovery. See Aubuchon Co. v. Benefirst, LLC, Civil Action No. 5-40159, 2007 U.S. Dist. LEXIS 44574, at *10 - *11 (D. Mass. Feb. 6, 2007) (finding that backup tapes are "inaccessible" by definition); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 319-20 n. 61 (S.D.N.Y. 2003) (noting difference between discovery of "accessible" information

and "inaccessible" information such as backup tapes, and holding that cost-shifting may be appropriate when a party seeks to discover the latter); see also The Sedona Principles Addressing Electronic Document Production (Second Edition, June 2007), Principle 8 ("the primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes . . . requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources.").

In this matter, the Board and Local 31 cannot begin to establish good cause for the production of information from backup tapes. The enormous burden of this production, which is described below, is not outweighed by the marginal relevance of the information that might be found on the tapes. Moreover, such extensive production is not justified where, as here, the subpoenas in question are trial subpoenas that should be seeking specific documentary evidence for use during the trial of this case, and not broad pre-trial discovery which is by definition improper in a Board proceeding.

i. *The cost to CNN of restoring the available backup tapes that might contain potentially relevant information is staggering, and the time necessary for such restoration is prohibitively long.*

At CNN, backup tapes are kept for a set period of time (anywhere from thirty days to six months, depending on the type of server and the location and department involved) before they are released to be reused (or "recycled") in a subsequent backup. See McDonald Decl. at ¶8. In connection with this case and certain other matters, CNN has pulled certain backup tapes out of the applicable recycle rotation ("pulled backup tapes"). Id. at ¶9. Right now the company has more than 16,600 pulled backup tapes. Id. If the instructions of the Subpoenas are enforced, CNN would have to restore thousands of these pulled backup tapes to access the information on the tapes and search for responsive documents that had been deleted from active storage. It

would be necessary to restore so many of the pulled backup tapes because, short of restoring the entire tape, there is no readily accessible means of identifying exactly what information is on many of the tapes. See id. at ¶10.

According to Kroll Ontrack, one of the most experienced, respected, and often-used e-discovery vendors in the industry, the process of restoring as many as 16,000 backup tapes – which is just one step in the arduous task of accessing, processing, searching, and producing information from the tapes – could cost more than ***eight million dollars*** and take more than ***sixty-four thousand*** hours to complete. See Declaration of Stuart Hanley ("Hanley Decl."), attached at Exhibit G to Exhibit 1, at ¶ 7 and Ex. 2.

Using historical averages and standard conventions in the e-discovery industry, one gigabyte of data translates very roughly into 50,000 to 75,000 pages of information. See Hanley Decl. ¶ 8(g). An average backup tape at CNN holds around 300 gigabytes of data. See McDonald Decl. at ¶11. Thus, if most of the pulled backup tapes were restored, the potential number of pages of data that would have to be processed and filtered for information relevant to this matter is so large that it cannot be calculated without a scientific calculator. Calculated by hand, the result for 16,000 backup tapes is approximately ***300 billion pages***.[16]

A subpoena is unduly burdensome if it will "seriously disrupt [the responding party's] normal business operations." NLRB v. Carolina Food Processors, 81 F.3d 507, 513 (4th Cir. 1996). A party's normal business operations are disrupted when it would take a large number of

[16] CNN cannot readily determine precisely how many of the 16,600 backup tapes would have to be restored if it were required to comply with the Subpoenas. Some of the tapes might be excluded from the restoration project based on information about the contents of those tapes available in a tape catalog. See McDonald Decl. at ¶10. But with respect to all of the backup tapes for Exchange E-Mail servers, and with respect to the tapes for which catalog information is not available, the contents of the tape would have to be restored to determine if potentially relevant information is contained on the tape.

person-hours to comply with the subpoena. See, e.g., Flatow v. Islamic Republic of Iran, 202 F.R.D. 35, 37 (D.D.C. 2001) (quashing subpoenas issued to two companies where the court found that to comply with the subpoena would take one company 885 person-hours (111 eight-hour days) and the other approximately 335 person-hours (42 eight-hour days)).[17] Kroll Ontrack's eight million dollar and sixty-four thousand hour estimate for backup tape restoration – which does not include the expense or time of de-duplicating, filtering, and searching these billions of pages prior to processing and attorney review – surely proves that the Subpoenas would "seriously disrupt" CNN's operations. The Kroll estimate also does not include the enormous amount of attorney time and fees that CNN would incur to review the millions of pages that would be generated in the restoration, even after techniques had been employed to reduce the size of the collection of information to be reviewed. When those dollars and person-hours are added to the total for this project, the burden would be staggering to the point of impossibility. Moreover, such a project could never be accomplished before the trial concludes.

ii. *The speculative benefit to the Board and Local 31 of obtaining the information on CNN's backup tapes does not outweigh the cost and burden of restoring the tapes.*

The General Counsel and Local 31 cannot make an adequate showing that the information contained on the thousands of disaster recovery backup tapes will include relevant, admissible evidence that may be used at trial. Indeed, with respect to many of the tapes, without restoring the tapes and examining the information on each, there is no way to know what is on them, much less whether the files will contain relevant documentary evidence. Demanding that

[17] See also SEC v. Brady, 238 F.R.D. 429, 438 (N.D. Tex. 2006) (subpoena quashed where company estimated that it would take 226 hours to review the hard copy files for responsiveness and privilege and 16,111 hours to review the electronic data for responsiveness and privilege); Perez v. City of Chi., Case No. 02-C-1969, 2004 U.S. Dist. LEXIS 7415 (N.D. Ill. Apr. 29, 2004) (quashing subpoena when it would take 200-300 hours to comply).

CNN restore the tapes therefore is a pure fishing expedition, at massive expense, and is exactly the type of broad, unfocused, discovery the General Counsel and charging parties are prohibited from conducting. See Interstate Builders, Inc., 334 NLRB 835, 842 (2001) (granting petition to revoke subpoena because the subpoena "appears to be a fishing expedition or, at best, an attempt at pretrial discovery, which is not allowed by the Board").

Even in civil litigation, where pretrial discovery is permitted, before ordering a party to restore a backup tape, "there must be some indication that the files stored on the backup tape may contain relevant information. Because of the extraordinary expense of restoration and review, this process should not be undertaken without justification." In re Priceline.com, 233 F.R.D. 88, 90-91 (D. Conn. 2005). Courts have held routinely that restoration of backup tapes in quantities far fewer than those involved here is unduly burdensome. See, e.g., id. ("[o]rdering restoration of all 223 backup tapes [could] be a colossal waste of resources"); Board of County Comm'rs v. Department of the Interior, Case No. 2:06-cv-209, 2007 U.S. Dist. LEXIS 54462 (D. Utah July 26, 2007) (finding that the plaintiff's request that defendant search though 600 backup tapes at the cost of $280,000, when plaintiff had only a mere suspicion that relevant information would be found, was unduly burdensome); Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., Civil Action No. 04-cv-00329, 2007 U.S. Dist. LEXIS 15277, at *48 (D. Colo. Mar. 2, 2007) (rejecting subpoena requesting restoration of backup tapes where process would take 3200 hours to restore and 800 hours to search); cf. McPeek v. Ashcroft, 212 F.R.D. 33, 35 (D.D.C. 2003) ("The frustration of electronic discovery as it relates to backup tapes is that backup tapes collect information indiscriminately, regardless of topic. One, therefore, cannot reasonably predict that information is likely to be on a particular tape.").

iii. *The General Counsel's proposed "two-tier" approach to backup tape discovery is unworkable.*

In negotiations over the NLRB Subpoena, the General Counsel proposed a "two-tier" approach to production that would have CNN first produce information from "active" or "accessible" storage. If, in the General Counsel's view, additional documents are needed, then there would be a "focused, specific, targeted and limited" production from backup tapes. See October 18, 2007 letter from. C. Baumerich to Z. Fasman, p. 2.[18] But the proposal is wholly unworkable, and does not eliminate or even significantly alleviate the undue burden and expense imposed on CNN.

The General's Counsel's proposal fails to appreciate that producing all the information called for by the NLRB Subpoena, ***even if gathered only from "active" or "accessible" sources***, still shoulders CNN with an immense burden. Such a production would require that CNN individually interview hundreds of employees who potentially possess responsive information, to find out what information the employee may have and where the employee stored such information.[19] The following is a list of just some of the places CNN would have to look for potentially responsive information from these hundreds of employees:

- For e-mail:
    - In the Microsoft Outlook mailbox on the Exchange server
    - In an archived e-mail file on a desktop computer hard drive

[18] CNN never agreed to this "two-tier" production proposal, and the General Counsel never agreed to amend the NLRB Subpoena to include its two-tier approach.

[19] CNN's search for responsive information must encompass such a large number of employees because, in Instruction D of the NLRB Subpoena, the General Counsel defines the scope of the persons the Subpoena is intended to cover extremely broadly as "CNN's present or former agents, attorneys, accountants, advisors, consultants, experts, investigators, supervisors, officials, agents, or other persons or companies acting on its behalf or directly or indirectly employed by or connected with CNN, including Turner Broadcasting Systems (TBS) and Time Warner."

- In an archived e-mail file on a laptop computer hard drive
- In an archived e-mail file on a networked server
- In an archived e-mail file on a DVD, thumb drive, or other removable media
- On a Blackberry, cell phone, or PDA

- For spreadsheets, word processing documents, and PowerPoints:
  - In a file folder on a desktop computer hard drive
  - In a file folder on a laptop computer hard drive
  - In a shared space on a network server
  - On a DVD, thumb drive, or other removable media

All these potential sources of electronic information are considered "active" or "accessible" as those terms are used by the General Counsel. "Limiting" production to these sources is not a meaningful limitation at all.

According to the General Counsel, the second tier of the production would be limited to information maintained on "specific backup tapes." Even if the production was only limited to some backup tapes, however, the tapes are still "not reasonably accessible," and not subject to discovery without a showing by the General Counsel of good cause (which it has not made). Moreover, the General Counsel's proposal demonstrates that it does not fully understand how data is maintained on CNN's backup tapes. There is no readily accessible means of identifying exactly what information is on many of the more than 16,000 tapes being maintained by CNN without first restoring the tape in its entirety. There is a "catalog" of the inventory of backup tapes at CNN which is generated by the backup software. See McDonald Dec. ¶ 10. This catalog can be searched by tape number, server name, folder name, file name, etc. However, the

functionality of this catalog is limited in two significant ways: (1) only portions of the catalog are readily accessible and (2) searches across the entire active catalog can take upwards of 50 hours to run. Id. Of the more than 16,600 backup tapes, information about some of those tapes will only be found in the archived portions of the catalog that are not readily searchable. Id. The General Counsel's representation about the ease of the "tier two" approach is at odds with the technical limitations of how information is stored on backup tapes.

iv. *If the Board requires CNN to restore any backup tapes, the Counsel for the General Counsel and Local 31 should bear the cost.*

Complying with the Subpoenas undoubtedly will cost CNN millions of dollars, and for that reason alone the Subpoenas should have been revoked in their entirety. Especially given that the General Counsel and Local 31 have not, and cannot, proffer any evidence that there is any relevant material on the backup tapes, current federal law provides that, if the Subpoenas are enforced in whole or in part, the propounding parties should bear this enormous cost. The pivotal case of Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003), set forth a widely followed standard for determining when cost-shifting is appropriate. In order of importance, these factors are:

1. The extent to which the request is specifically tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information.

Zubulake, 217 F.R.D. at 322. Given that the Subpoenas are not narrowly tailored, and the total cost of production would be well into the millions of dollars, the cost for restoration of any backup tapes and analysis of the resulting documents, which may not even produce any relevant information, should be shifted to the General Counsel and Local 31.

2. The NLRB Subpoena's Requests For "All Electronic Mail," "All Word Processing" Files, And "All Electronic Data Files" That Contain Any Reference To The Bureau Staffing Project Are Overly Broad And Unduly Burdensome.

The NLRB Subpoena purports to require that CNN produce the following electronic files, if the file contains any information about – or ***even a mere reference to*** – the Bureau Staffing Project:

- "All electronic mail (email and text messages) and information about email (including message contents, header information and logs of email usage)" "sent or received by computer, blackberry, and/or cell phone," for a list of more than eighty people, including current and former employees, as well as some people who have never been employed by CNN (Request 2);
- "All word processing . . . files, including prior drafts, "deleted" files, and file fragments" (Request 6); and
- "All electronic data files, "deleted" files, and file fragments created or used by spreadsheet, presentation, media or diagramming programs" (Request 7).

Even if CNN were to collect, filter, process and produce active e-mail files and other electronic information ***only*** from the 81 persons named in Request 2 of the NLRB Subpoena (which is not what the NLRB Subpoena seems to contemplate for Requests 6 and 7, which are not limited to the 81 named persons, and if read literally, ask for information in the possession of innumerable employees at CNN), the burden is enormous. Depending on the volume of data ultimately collected from these custodians, and depending on how much of the collected

information must be processed after some initial search-term filters are applied, the project is estimated to cost between $400,000 and more than $800,000. See Hanley Decl. Ex. 2.[20] And again, those costs do not include the time for attorneys to review the information before production. To forensically analyze just ***one hard drive*** for deleted files and file fragments would cost $3,300 and take at least a week – the number of hard drives on which potentially relevant information might exist is likely more than ***a hundred***. See Hanley Decl. ¶ 10. These substantial burdens, in terms of both dollar cost and human resources, are not justified given the marginal relevance – if any – of the information sought by the NLRB Subpoena.[21]

3. The Requests For Production Of Electronically Stored Information In "Native Format" Are Improper.

The Definitions and Instructions in the NLRB Subpoena demand production of all electronically stored information "in its native format." The "Instructions" section of the Local

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[20] This cost estimate assumes that responsive information will be produced to the Board in a standard "tiff" image file format. If the information were produced in "native format" as the NLRB Subpoena demands (see Section 3. below), the cost would be even higher. See Hanley Decl. ¶ 8(i).

[21] The General Counsel proposed to "limit" the NLRB Subpoena by providing CNN with a four-page list of search terms. See October 18, 2007 letter from C. Baumerich to Z. Fasman, Attachment A. But the universe of information potentially responsive to the wide-ranging demands of the NLRB Subpoena is not found on one computer or in one central database that can easily be "searched" with a few keystrokes. Information is contained on a large number of sources, including network servers, individual hard drives, removable storage media such as CDs, and personal email accounts. These various sources would have to be swept, and the information sent to a vendor for processing into accessible formats, before a search term process could be effectively utilized. The difficulty of that task comprises a large portion of the objectionable burden and expense. Moreover, for a search term project to be successful, the search terms must be carefully selected to weed out irrelevant documents and select only the potentially relevant documents. Using proposed terms such as "Atlanta," "BEST," "camera," "half," "editor," and "microphone" to search the documents and emails of a news broadcast agency will undoubtedly retrieve documents and emails that are completely unrelated to this litigation. Indeed, use of the General Counsel's proposed search term "IT" will bring up every document containing the word "it" in the text – which is likely to be virtually every document searched.

31 Subpoena ask for production of all electronically stored information in its "native file," defined by Local 31 as "electronically stored information in the electronic format of the application in which such ESI is normally created, viewed and/or modified." Yet, in abrogration of the standard developed by the federal courts and now set forth in the Federal Rules of Civil Procedure, the Board and Local 31 never provided CNN with any explanation as to why the unwieldy "native format" is demanded, as opposed to the format in which the information is normally maintained or some other reasonably usable format. Thus, the Subpoenas should have been revoked to the extent they sought an entirely native format production.

i. *Native Format vs. Image Formats.*

"Native format" is the default file format of a given software application, such as Word, Excel, or PowerPoint. Documents created in these application-specific formats are typically converted to an alternative format when produced in litigation, so the documents can be more easily maintained, manipulated, and searched in a database or other document management system. The General Counsel recognizes that the "most widely used" format for production is an image-based format such as Tagged Image File format (.tiff) or Portable Document Format (.pdf), in which the original electronic document is converted to an image form. See General Counsel Memo at 10. These image-based formats allow documents to be Bates stamped for identification, and enable portions of a document to be redacted for privilege or other reasons. Id. at 11. An image of the document, as opposed to the document in its native form, cannot be altered (intentionally or unintentionally). Image format documents are typically produced with a file called a "load file," which contains information about the document, and allows the document to be loaded into a searchable database.

In its recent Memorandum on electronic discovery, the Office of the General Counsel acknowledges that, in amending Federal Rule of Civil Procedure 34(b), one of the Advisory

Committee's goals was to encourage parties to produce information in formats that would be inexpensive for the producing party and reasonably useable for the requesting party. See General Counsel Memo at 3. Rule 34(b) now provides that in the absence of agreement or a specific court order, "a producing party should produce electronically stored information either in the form in which it is 'ordinarily maintained' or in a 'reasonably usable' form." Id.; see also Federal Rule of Civil Procedure 34(b), Advisory Committee Notes. The Board's and Local 31's unilateral demand for all electronic information in "native format," without allowing the alternative of a "reasonably usable" format such as a .tiff or .pdf image, fails to recognize the guidance of this new rule of procedure, which was reiterated in the General Counsel's recent memorandum.

ii. *The disadvantages of native format.*

As the Board's own guidelines state, there are numerous disadvantages to the production of electronic information in native format. See General Counsel Memo at 11. For example, information produced in native format is difficult to Bates number, rendering it unwieldy to keep track of what is produced or to reference any document within a production. Id. Native format also hinders the redaction of privileged information. Id. Further, documents produced in their native form must be viewed using the native or other compatible applications, which complicates and slows down the review, and requires the requesting party to purchase or otherwise obtain the necessary software to review the materials.[22] Id.

[22] In some instances, the software necessary to read a native format file is not an off-the-shelf, commercially available product like Microsoft Word, but is proprietary software created by CNN. In those instances, CNN should not be required to turn over its trade secrets or highly confidential or proprietary information merely to enable the Board and Local 31 to review information in native format.

Moreover, production in native format hinders the authentication and admissibility of evidence. A document cannot be entered into evidence unless it is authenticated. See Fed. R. Evid. 901. A document and its related metadata can be altered by the recipient of the production simply by opening the document in its native software, potentially causing spoliation of the evidence. See General Counsel Memo at 11. For this reason, and because native format documents are difficult to Bates number or otherwise track and control, the integrity of information produced in native format is subject to challenge. Thus, the process of authenticating native format documents is tedious and time-consuming, because each exhibit offered into evidence in its native format has to be compared against the original document to ensure that it is an accurate and authentic copy which has not been altered (even inadvertently).

iii. *Native format is not necessary for spreadsheets or transmittal emails.*

During the parties' attempts to reach a compromise on the NLRB Subpoena, the General Counsel withdrew its demand for production of electronic information in native format for certain categories of documents.[23] But native format production is not necessary for ***any*** documents.

The General Counsel argued that it needs in native format the spreadsheets regarding applicants that were shared between or used by managers involved in the Bureau Staffing Project, because absent native format production, it will not be able to "unhide" columns, reveal highlighting, view formulas, review track changes, etc. See October 18, 2007 letter from C. Baumerich to Z. Fasman, pp. 2-3. This contention is incorrect. CNN's production of

[23] Counsel for the General Counsel refused to withdraw the NLRB Subpoena as drafted or to modify it to remove the demand for native format production. Accordingly, the requirement of an entirely native format remains pending.

spreadsheets in a .jpg format accomplished many of these objectives, such as unhiding columns, widening columns to show all data, making highlighting or other color visible, and viewing formulas. As for the ability to view track changes history, such information is not relevant here.

Similarly, the General Counsel mistakenly claimed that production in native format is required because only a native format production will enable the General Counsel to "match-up" the spreadsheet with the transmittal e-mail. See October 18, 2007 letter from C. Baumerich to Z. Fasman, p. 3. That argument is not correct. The load file for each spreadsheet produced by CNN identified the "parent/child" relationship between the document and any e-mail to which it was attached. Native format production of these e-mails is not necessary for this purpose.

4. The Subpoenas Request Huge Quantities Of Wholly Irrelevant "Metadata."

Instruction E to the NLRB Subpoena, which applies to all 243 requests, states in pertinent part: "If any responsive documents exist as electronically stored information, [then] production is requested in its native form, ***with all metadata*** and attachments intact." (Emphasis added.) Instruction 2.c. to the Local 31 Subpoena states that CNN "is required to produce ***all Metadata*** (Embedded Metadata, System Metadata, and Substantive Metadata) generated during the creation, modification, or storage of the Electronically Stored Information." (Emphasis added.) In this matter, metadata is absolutely irrelevant to any issue in dispute, is not admissible evidence, and therefore is not subject to subpoena.

i. *What is metadata?*

Metadata is information about an electronic document that is embedded in or associated with the document.[24] See General Counsel Memo at 4. "Some examples of metadata for

[24] Metadata is commonly described as "data about data." Oxford English Dictionary (2007) defines metadata as "a set of data that describes and gives information about other data." (continued...)

electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept." Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 547 (D. Md. 2007).

ii. *Metadata is not relevant in this matter.*

Metadata is not generally discoverable because it is not typically relevant to most disputes. See Wyeth v. Impax Labs., Inc., Civil Action No. 06-222-JJR, 2006 U.S. Dist. LEXIS 79761, at *4 (D. Del. Oct. 26, 2006) ("Most metadata is of limited evidentiary value, and reviewing it can waste litigation resources."). "Emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata." Id. The relevance of metadata must be assessed in the context of the pending dispute, just like any other request for documents or information – if it is not relevant in a particular matter, it is not properly requested. See, e.g., Jackson Hosp. Corp., 2007 NLRB LEXIS 69 (Feb. 22, 2007) (quashing subpoena as there was "an absence of either claimed or apparent relevancy" of metadata). In the instant case, most metadata is simply not relevant.

By way of illustration, with respect to a memorandum, the associated metadata can include information such as: who created the memo; where the memo was found in the computer

(...continued)

Appendix F to The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age defines metadata as "information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information)."

network; the history of every edit to the memo (no matter how minor the edit); the date and time of each occasion on which the document was accessed, saved, or printed; on which printer it was printed and by whom; the identification of each computer on which the memo had been stored and opened; the font type and size; the line spacing; the inclusion and location of tab stops; the numbering or outlining schemes used in the document; and the location of paragraph returns, page breaks, and section breaks.

Most of this information has no relevance to this matter, and certainly would never be introduced as evidence in a hearing. The request for all metadata is discovery, plain and simple, and it is flatly inappropriate for a trial subpoena. Moreover, if CNN provided "all metadata" associated with every responsive electronic document it produced (which could include word processing documents, spreadsheets, slide presentations, database extracts, and e-mail messages), the quantity of the metadata turned over by CNN would be overwhelming. These requests are wholly improper and should have been stricken by the Administrative Law Judge.[25]

5. The Board's Requests For "All Databases" And Technical Information About The Databases Are Overbroad And Call For Irrelevant Information.

Request No. 5 of the NLRB Subpoena seeks "[a]ll databases (including all records and fields and structural information in such databases), containing any reference to and/or about the Bureau Staffing Project or the tracking of applicants or employees to staff the Bureau Staffing Project or to fill positions associated with the Bureau Staffing Project." This request, like so

[25] Similar to the situation with native format production, Counsel for the General Counsel agreed during negotiations over the NLRB Subpoena to forego the request for "all" metadata, and instead ask for a limited set of specified metadata fields. See October 18, 2007 letter from C. Baumerich to Z. Fasman, p. 2. CNN agreed that this list of fields was reasonable. However, because Counsel for the General Counsel never modified the NLRB Subpoena, the original demand for "all" metadata survives.

many others, is discovery pure and simple, and should have been stricken for this reason alone. Moreover, the request is not narrowly tailored to seek only relevant information.

Even were this a case in which discovery was permissible, to the extent there are databases that contain relevant evidence admissible at trial (which CNN is not conceding), the General Counsel would only be entitled to obtain relevant information from those sources, not all information. See, e.g. Bolton v. Sprint/United Mgmt. Co., Case No. 05-2361, 2007 U.S. Dist. LEXIS 16814, at *17 (D. Kan. Mar. 8, 2007) (ruling that a request for "any and all databases" operated by the company to be overbroad; accordingly, the court denied plaintiff's motion to compel the defendant to produce this information); Raytheon Aircraft Corp. v. United States, Civil Action No. 05-2328, 2006 U.S. Dist. LEXIS 63363 (D. Kan. Sept. 5, 2006) (finding that a request for all databases to be overly broad on its face); Cummings v. GMC, 365 F.3d 944, 954 (10th Cir. 2004) (denial of a motion to compel access to a company's database as the request was overbroad and unduly burdensome). Permitting the General Counsel access to the entire contents of CNN's databases, when only portions of such databases might contain relevant evidence, is not only unnecessary but also a completely unwarranted invasion of CNN's entire record-keeping system. See Health Alliance Network v. Continental Cas. Co., 01 Civ. 5858, 2007 U.S. Dist. LEXIS 63116, at *20 (S.D.N.Y. July 30, 2007) (allowing a party complete access to database would "hurt both the producing party, who may be required to produce confidential and non-relevant data to outside parties, and to the party making the discovery request, who would have to sort through mountains of unhelpful information").

The Board's related request for documents such as all data dictionaries, data entry manuals, code books, guidebooks, record layouts, lookup tables, and other documentation associated with databases also seeks improper discovery information with no conceivable

evidentiary purpose in these proceedings. See NLRB Subpoena Instructions paragraphs P, Q, R; Request No. 9. This request is overbroad on its face because "[u]nrelated documents that even fleetingly reference the personnel database would have to be produced in response to this request." Johnson v. Kraft Foods N. Am., Inc., 238 F.R.D. 648, 656 (D. Kan. 2006) (refusing to compel production because the request for all documents regarding the database was overbroad on its face); Williams v. E. I. DuPont de Nemours & Co., 119 F.R.D. 648, 651 (W.D. Ky. 1987) (request for all documents regarding creation of database "is overbroad and may introduce into the discovery documents that are not relevant").

6. The NLRB Subpoena Seeks Irrelevant Technical Information About CNN's E-Mail And Messaging Systems.

Request No. 3 of the NLRB Subpoena calls for the production of technical information about CNN's various e-mail and messaging systems, including procedures for "backing up," "preserving," "purging," or "erasing" messages, "retrieving" deleted messages from computers, Blackberries, and cell phones, and "retrieving" messages from network servers. Such information will not provide the Board with any evidence that could be used at trial. Rather, such a request is a classic example of an early discovery request in a civil proceeding, where the parties are engaged in the process of learning about each others' computer systems for the purpose of conducting more focused and efficient discovery seeking production of the information in those systems. In these NLRB proceedings, the request is flatly improper discovery.

D. The Subpoenas Seek Privileged Information.

1. The Subpoenas Unlawfully Attempt To Invade The Reporter's Privilege.

The U.S. Supreme Court has long recognized that news-gathering should qualify for some First Amendment protection and that "without some protection for seeking out the news,

freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972). The Administrative Law Judge should have revoked the Subpoenas to the extent they command disclosure of information that falls within the ambit of this well-recognized journalists' privilege, which the District of Columbia Circuit recently affirmed. Even Counsel for the General Counsel admits that it does not ask CNN to disclose the "fruits" of its journalists' labors – including sources' names, notes for stories, tapes or video recordings – because these materials are protected by privilege. See General Counsel's Opposition to Respondent CNN's and Respondent TVS' Petitions to Revoke Subpoenas Duces Tecum ("Opposition") at 97, attached as Exhibit 2. But the General Counsel insists that CNN must disclose other information pertaining to its news-gathering and editorial processes and procedures. Id at 97. Illustrative examples of requests in the NLRB Subpoena that implicate CNN's news-gathering and editorial functions include:

> Request No. 90: This request seeks all documents showing that TVS camera and/or audio operators or other field crew technicians, or CNN photojournalists –
>
> - edited pieces of broadcast,
> - communicated with a CNN producer or correspondent about a story,
> - shot "B roll,"
> - asked questions of an interview subject, or
> - came up with their own story or image to be pitched for broadcast.
>
> Request No. 91: This request seeks all documents showing that a CNN photojournalist conceived an entire story, pitched it, and had it accepted to air on a CNN program.
>
> Request No. 202: All CNN "rundowns" (which are documents that list the stories anticipated to air during each CNN show, including stories that do not eventually make it to air, and which often include editorial notes about the show), including any CNN producer changes to any "rundowns."

Each of these requests seeks information going to the heart of CNN's newsgathering function and its editorial process. However, the General Counsel offers no explanation for why it needs any of this information to prosecute its case. Why, for example, does the General Counsel need to know what questions a photojournalist asked an interview subject? Why does the General Counsel need to read about a story pitch made by a photojournalist to a publisher of the Larry King show? Why does the General Counsel need to learn what segments of any given Anderson Cooper 360° show were planned (and therefore listed on a rundown) but not ultimately aired? The answer in each instance is that the General Counsel does ***not*** need access to this information for the trial of this case. The General Counsel also does not assert, as it must, that it has unsuccessfully attempted to obtain this information elsewhere, or argue that its interest in the disclosure outweighs the public interest in preserving the journalists' privilege. To the contrary, CNN's interest in protecting information that reflects the details of its newsgathering outweighs the General Counsel's needs, and the General Counsel failed to make a credible case to overcome CNN's privilege under controlling law.

i. *The Administrative Law Judge Applied The Wrong Circuit's Law.*

Judge Amchan erroneously relied on Seventh Circuit precedent in concluding that CNN's privilege extends only to confidential sources. See December 3, 2007 Transcript, p. 108 (Administrative Law Judge states that he is "sticking with Judge Posner" and relying on the Seventh Circuit Decision in McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003)). CNN's privilege in this case is governed by the District of Columbia Circuit,[26] not the Seventh Circuit.

[26] Because the privileged information sought by the Subpoenas includes documents created, utilized or originated in the District of Columbia, this Memorandum applies District of Columbia law regarding the reporter's privilege. To the extent that the privilege implicates documents created, utilized or originated in New York, Second Circuit law applies, which is substantially (continued...)

The District of Columbia Circuit explicitly recognizes the existence of the First Amendment protection not just for confidential sources, but also for the media's editorial and news-gathering processes and procedures. See Lee v. Department of Justice, 413 F.3d 53, 58 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 2351 (2006) (reaffirming existence of reporter's privilege in civil actions), Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981) (applying three-part test for the privilege and stating "in the ordinary case the civil litigant's interest in disclosure should yield to the journalist privilege"); NLRB v. Mortensen, 701 F. Supp. 244, 247 (D.D.C. 1988) (acknowledging that the First Amendment protection extends beyond the identity of confidential sources to the protection of reportorial and editorial processes); Maddox v. Williams, 23 Media L. Rptr. 2118, 2119 (1995) (adopting and applying the Zerilli test to prevent the disclosure of documents protected by the journalist privilege), attached as Exhibit 9; Tripp v. Department of Defense, 284 F. Supp. 2d 50, 54 (D.D.C. 2003) (recognizing the existence of the privilege to extend beyond confidential documents).[27]

The decision in Valley Camp Coal, 265 NLRB 1683 (1982), which has been cited by Local 31 in support of its position, is not persuasive in this matter. In that case, the subpoena issued by the Board sought testimony by a journalist merely to corroborate quotes published in the journalist's newspaper. The Board rejected the journalist's argument that she had an "absolute privilege," akin to a Fifth Amendment privilege, not to appear and testify in a judicial

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(...continued)
similar to the District of Columbia authority cited herein. See, e.g., Baker v. F&F Inv., 470 F.2d 778, 783-784 (2d Cir. 1972).

[27] See also United States v. Burke, 7 Med. L. Rptr. 2019 (E.D.N.Y. 1981), aff'd, 700 F.2d 70 (2d Cir. 1983) (the press has a qualified First Amendment privilege in order to "maintain the integrity of its newsgathering and editorial functions"), attached as Exhibit 10; In re Consumers Union of U.S., Inc., 495 F. Supp. 582 (S.D.N.Y. 1980) (fact gathering and editorial privacy held to be significant aspects of a free press).

proceeding. In stark contrast, in this case CNN has been commanded to produce thousands of documents reflecting information that was never broadcast and revealing the details of editorial decisions of its journalists in deciding what should and should not air. Moreover, while the Board in Valley Camp Coal considered whether there existed alternative sources for the information sought (and found that there were none), Judge Amchan did not require the General Counsel to exhaust non-media sources readily available to it.

Here, in following McKevitt v. Pallasch, as opposed to Zerilli v. Smith and its progeny, the Administrative Law Judge stripped CNN of the First Amendment privilege under which it is protected under controlling law. The Board should reverse the incorrect conclusion of law and apply the privilege.

ii. *The Administrative Law Judge Applied the Wrong Legal Standard.*

By turning to the wrong Circuit's precedents, the Administrative Law Judge also applied the wrong legal standard. He reasoned that, to the extent a privilege applies to documents that do not contain information about a confidential source, the "equities" point in favor of the Board gaining access to such information. See December 3, 2007 Transcript, p. 109. The "equities," however, do not determine whether the reporter's privilege applies to protect CNN's First Amendment interests. Once the privilege attaches, the burden shifts to the General Counsel to make a specific showing under a rigid test: the Board's interest in disclosure must outweigh CNN's interest in protecting its privileged information. See Zerilli, 656 F.2d at 710; Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974) (stating that courts should look to the facts of each case, and weigh the public interest in protecting the journalist's sources against the private interest in compelling disclosure). Specifically, to overcome the privilege, the General Counsel must satisfy the following three-part test:

- First, the General Counsel must demonstrate that alternative sources are not available for the information sought from the journalist;
- Second, the General Counsel must prove that the information sought is crucial to the claim; and
- Third, the General Counsel must demonstrate that private interest in compelling disclosure does not outweigh the public interest in preserving the privilege.

See Mortensen, 701 F. Supp. at 248; Zerilli, 656 F.2d at 710; United States v. Burke, 7 Med. L. Rptr. 2019, 2021 (E.D.N.Y. 1981); In re Consumers Union of U.S., Inc., 495 F. Supp. 582 (S.D.N.Y. 1980).

The Mortensen case, which the Administrative Law Judge incorrectly cited to support his alternative ruling at the December 3, 2007 hearing, demonstrates the heaviness of the burden of overcoming the privilege. In Mortensen, three journalists were subpoenaed to authenticate published statements attributed to NFL management council members regarding anti-union activities. The District Court for the District of Columbia engaged in a detailed application of the three-part test in order to determine the applicability of the reporter's privilege. It reasoned that the movant had to demonstrate that the management's reporting deadline rule was discriminatory in order to establish its case. To establish this, the movant first exhausted all possible non-privileged sources, including documents procured by subpoena from third parties and information obtained through interviews with individuals who appeared before the Board. The movant proved that the journalist's testimony was crucial because the journalists were the only remaining source of information with knowledge regarding the officials' statements about the reporting deadline. Given that the testimony sought was crucial to the issue in the case, and the movant exhausted all alternate means in which to realize the information, the Mortensen court ordered the disclosure of the news information. Mortensen, 701 F. Supp. at 248.

Contrary to Mortensen, where the court rigidly applied the privilege but found that the movant had satisfied the strict test for overcoming the privilege, the Administrative Law Judge here granted the General Counsel access to protected material without requiring it to make ***any*** meaningful demonstration that the applicable test had been satisfied. Specifically, the General Counsel did not demonstrate that the information sought may not be obtained from alternative sources, it failed to prove that the information sought is crucial to its claims, and it failed to show that CNN's interest in protecting the substance of its newsgathering outweighs the General Counsel's need for the information.

(1) The General Counsel Failed To Demonstrate That The Information Sought May Not Be Obtained from Alternative Sources.

The General Counsel failed to demonstrate that it pursued any alternative sources of the privileged information sought from CNN. Rather than explaining what alternative sources it pursued, and why it was unsuccessful, the General Counsel merely concluded that there "are no other sources" and that "the information requested is only in the hands of CNN (and to a minor extent TVS), and so there is no reasonable alternative source for the information." Opposition to Revoke Subpoenas at 97, 101. The General Counsel's cavalier dismissal of alternate sources is insufficient under Zerilli and Mortensen. There is no indication, for example, that the General Counsel exhausted the knowledge of any witnesses available to him regarding CNN's change in news-gathering procedures following the termination of its agreements with TVS. Moreover, the General Counsel has received thousands of documents from TVS and CNN, including sample documents that show the role of various TVS employees in the news-gathering process, but do

not disclose the substance of the information discussed.[28] The General Counsel has yet to assess this information and determine why the additional information about the content of the news gathered is critical to its case. Finally, other than its self-serving, conclusory assertion, the General Counsel has not established that CNN is the only keeper of the type of *information* – as opposed to the unredacted *documents* in CNN's possession – that it seeks through the NLRB Subpoena. Because the General Counsel failed to demonstrate exhaustion of alternative sources, some of which are readily available, CNN should not be compelled to produce its privileged information. See Mortensen, 701 F. Supp. at 248 (citing Carey, 492 F.2d at 639).

(2) The General Counsel Did Not Prove That The Privileged Information is Crucial to its Claim.

Disclosure of information subject to the reporter's privilege also should not be required if the information sought is only marginally relevant to the case. See Baker v. F&F Inv., 470 F.2d 778, 783-84 (2d Cir. 1972). Only if the civil litigant's need for the information goes to the "heart of the matter" or is crucial to its case, should disclosure be compelled. See Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981) (citing Carey, 492 F.2d at 636); Baker, 470 F.3d at 783-84 (holding that the compulsion of disclosure was weak because the information was not crucial).

[28] Without waiving its objection, and in an attempt to try to compromise with the General Counsel, CNN provided the General Counsel with redacted versions of rundowns it previously provided to Judge Amchan for in camera review. See November 30, 2007 e-mail and attachments from T. Duffield to C. Baumerich and T. McCarthy, attached as Exhibit 11. The redacted documents show the names and times of individuals contributing to the rundowns, but remove the substance of the fact-gathering such as stories, pitches, and ideas, which go directly to the heart of the reporter's privilege. The proffer of this information in a redacted format satisfies any potential need by the General Counsel, and eliminates the need for CNN to disclose the substance of storylines, pitches and ideas, which it seeks to protect under the reporter's privilege.

The General Counsel has not met its burden of showing that the news-gathering procedures it seeks constitute crucial information that goes to the heart of this case. The issues in this case focus on CNN and TVS as joint employers, CNN as a successor to TVS, and claims that CNN engaged in discrimination against former TVS employees. The specific details about the substance of CNN's news-gathering efforts are not germane to these claims. While the General Counsel may be entitled to learn who was responsible for performing what tasks, it is not entitled to discover information about the fact gathering underlying a news story, the subjects of story pitches, draft scripts, rundowns containing unaired material, and unaired footage – all of which has been subpoenaed. The General Counsel has made no clear and specific showing that such information is crucial to challenging CNN's defense that it sought to hire its own employees due to technological advancements and changes to its news gathering procedures. Because the General Counsel has not made the requisite showing, the information sought remains protected by the reporter's privilege.

(3) CNN's Interest in Protecting the Substance of its Newsgathering Outweighs the General Counsel's Need for the Information.

Even if the General Counsel was able to show that the information sought was crucial, private interest in compelling disclosure does not outweigh the public interest in preserving the privilege. The District of Columbia Circuit has acknowledged that the privilege is an important safeguard of a journalist's First Amendment right to gather the news, and the public's right to receive information. See Zerilli, 656 F.2d at 710; Carey, 492 F.2d at 636. CNN has provided the General Counsel with thousands of pages of unprivileged material, and access to redacted materials that would excise the content of news that has been gathered but provide information about the identity of the persons performing certain job duties. Moreover, the General Counsel

has neither exhausted alternative sources nor proved that the information sought goes to the heart of its claim.

Indeed, CNN has only asked that the General Counsel comply with the government's own policy on subpoenas to the news media, as expressed by the United States Attorney General in the Code of Federal Regulations. In deference to the editorial process, the government's express policy is to avoid "compulsory process, whether civil or criminal, which might impair the news gathering function." 28 C.F.R. §50.10 (2007). For this reason, "in every case" involving journalists, and not just those implicating confidential sources, "the government is required to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. §50.10(a). With due respect to Judge Amchan, his ruling that 28 C.F.R. §50.10 only applies to Justice Department employees is simply incorrect. See November 26, 2007 e-mail from Judge Amchan. That regulation by its express terms applies to "every case" in which a government agent issues a subpoena for information from a news organization.

Among other measures, before the government – including the General Counsel for the NLRB – seeks information from a news agency like CNN about its editorial process, "[a]ll reasonable attempts should be made to obtain information from alternative sources[,]" "[n]egotiations with the media shall be pursued in all cases[,]" and the government must demonstrate that "that the information sought is essential to the successful completion of the litigation in a case of substantial importance." 28 C.F.R. § 50.10 (b), (c), (f)(2). The guidelines also require the government to seek the express authorization of the Attorney General before seeking news-gathering information from a news agency. 28 U.S.C. § 50.10 (d). The General

Counsel has followed none of these strict requirements, and by not requiring that it do so, Judge Amchan has deprived CNN in these proceedings of the protection it would be entitled in proceedings involving the United States Attorney General.

Accordingly, under the specific facts before the Administrative Law Judge in this matter, the General Counsel's interest in the protected materials does not outweigh the public's interest in full enforcement of the privilege.

2. The Subpoenas Call For Information Protected By The Attorney-Client Privilege.

The Board has long recognized that parties generally need not produce attorney-client privileged information, stating that the attorney-client privilege is "so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade [the attorney client privilege] to establish adequate reasons to justify production through a subpoena or court order." Harvey Aluminum, Inc., 156 NLRB 1353, 1366 (1966); see also Brink's, Inc., 281 NLRB 468, 468-69 (1986). In Brink's, the employer served subpoenas upon the local union requesting, among other things, membership lists and related documents, "all minutes of meetings" and related documents, and "all communications" between the petitioner's officers and its law firm. 281 NLRB at 468-69. The Board noted that "the possibility that some of this requested information would be privileged is clear, and the subpoenas should have been drafted to minimize that possibility." Id. at 470.

The NLRB Subpoena not only fails to minimize the possibility that the requests would elicit privileged information, but some of the requests in fact ***specifically demand the production of privileged communications and work product materials***. For example, Request No. 2 seeks "[a]ll electronic mail (email and text messages) and information about email (including message contents, header information and logs of email usage) containing information about or related to

the Bureau Staffing Project that was sent or received by computer, blackberry, and/or cell phone from" a list of 81 individuals, including "***Lisa Reeves, In-House Counsel (Atlanta)***." Request No. 2 (emphasis added). This request plainly calls for the production of e-mail communications that contain legal advice or work product being sent by Ms. Reeves. Similarly, the NLRB Subpoena seeks "[a]ll electronically stored information and documents [from January 1, 2002 to the present] that indicate, show, discuss and/or mention, ***the meetings of CNN*** and the purpose of each meeting, attended by each of the individuals referenced . . . in Consolidated Complaint paragraphs 4(a) and (b)." Request No. 233 (emphasis added). Those two paragraphs identify 176 supervisors, managers, and agents of CNN, including ***in-house counsel.*** Certainly the vague reference to "the meetings of CNN" would encompass meetings with counsel where legal advice was sought or rendered. Similarly, the Local 31 Subpoena seeks documents protected by the attorney-client privilege. See, e.g., Requests 2a, 2b, 2d.

The General Counsel and Local 31 cannot, and have not even attempted to, justify any need for the privileged information the Subpoenas request.[29] Accordingly, the Administrative Law Judge should have revoked the Subpoenas to the extent they called for the production of documents protected by the attorney-client privilege.

E. The Collection Of Non-Electronic Documents Responsive To The Hundreds Of Requests In The Subpoenas Would Be Unduly Burdensome.

Even aside from the massive burden of collecting, processing, searching, and reviewing the electronically stored information sought by the Subpoenas, the task of gathering traditional hard copy paper documents also imposes an undue burden on CNN. Hunting down hard copy

[29] Notably, while the NLRB Subpoena includes nineteen paragraphs of specific instructions to CNN for how to interpret the Subpoena, there is no statement in these instructions that the Subpoena is not intended to solicit the production of privileged information.

documents responsive to the almost ***three hundred*** requests for such paper would require CNN to contact and interview virtually every current and former employee in the New York and Washington Bureaus to determine what, if any, responsive documents they have in their possession.

As just one example, consider Request No. 171 in the NLRB Subpoena, which calls for the production of:

> All electronically stored information and documents from the commencement of CNN's contractual relationship with TVS (TVS-NY and/or TVS-DC) until January 16, 2004 that indicate, show, discuss and/or mention ***any direction and/or assignment*** by CNN personnel of TVS employees and/or freelancers in the field, studio(s), control room(s), tape room(s), feed room(s), newsroom(s) and/or engineering department for work related to newsgathering and/or broadcast production activity.

To comply with this request, CNN would have to contact all current and former CNN personnel, wherever they are located, to locate documents regarding "directions" or "assignments." Given the nature of a news organization operating in the field, these "documents" could be found on thousands of scraps of paper and even on post-it notes. Such an undertaking – which the Subpoenas require in similar fashion more than two hundred times over – would significantly disrupt CNN's business operations. The Board and the charging parties are not permitted to impose such a disruption in an aimless search for information to support their case.

This is not a case in which CNN has been unwilling to produce relevant documents; CNN's good faith during the investigation and in the pre-trial period cannot be questioned. Where CNN has produced more than 85,000 documents already, the Board's and Local 31's eleventh-hour request that CNN spend countless hours performing sweeping searches for more documents should have been rejected by the Administrative Law Judge.

F. The Subpoenas Seek Irrelevant Information.

The Board's Casehandling Manual states that a "subpoena duces tecum should seek relevant evidence." NLRB Casehandling Manual § 11776. Here, the Subpoenas request a host of information with no arguable relevance to the claims before the Board and no evidentiary potential.

1. The Subpoenas Seeks Inadmissible Financial And Business Information About CNN.

The Subpoenas seek detailed financial information about the CNN workforce, including, by way of example, the economic impact of CNN's decision to relocate some applicants, to train its new workforce, and to use temporary staff in its operations while the new workforce was being trained. See NLRB Subpoena Requests No. 16-21, 44-49, 51-55; Local 31 Subpoena Requests No. 2d, 2e. For example, NLRB Request No. 45 calls for production of:

> All electronically stored information and documents that reflect ***any financial analysis*** of what it cost and/or was projected to cost CNN ***to operate under the TVS contracts***, and all electronically stored information and documents that reflect any ***financial analysis*** of what it would cost ***to terminate the TVS contracts and/or redefine CNN's operations by bringing the work in-house***.

Additionally, NLRB Request No. 17 demands "[a]ll electronically stored information and documents that show ***the overall budget for the Bureau Staffing*** Project and/or that show each individual who created and/or reviewed said budget." Local 31 Request No. 2e requests "All Projections of CNN labor costs after the decision to terminate the TVS contracts and hire a newly defined CNN workforce."

Apparently the Board intends to argue that CNN's decision to take these "expensive" steps was not economically justified. But neither the Board nor Local 31 is entitled to second-guess CNN's business decisions, and this information is not admissible as evidence. See Detroit Newspaper Agency, 342 NLRB 1268, 1273 (2004) ("[I]t is not our place to second-guess

personnel decisions"); NLRB v. Interstate Builders, Inc., 351 F.3d 1020, 1027 (10th Cir. 2003) ("[T]he Act does not allow the National Labor Relations Board to act as a 'super-employer in derogation of the right of the employer to select its employees or discharge them.'"); Basin Asphalt Co., 2006 NLRB LEXIS 239, at *45 (June 12, 2006) (agreeing that "the NLRB should not establish itself as a super personnel agency which assesses the reasonableness of an employer's disciplinary polices"); Cast-matic Corp., 2005 NLRB LEXIS 340, at *282 (July 21, 2005) ("I agree with the Respondent that generally it is beyond the purview of a judge to 'second guess' an employer in matters or areas relating to the conduct of his business").

Moreover, CNN witnesses already have testified under oath that the decision to terminate CNN's relationship with Team was not driven by economic factors, but was motivated by CNN's desire to take advantage of new technologies and more effectively cover the news. The pervasive inquiries into the economics of CNN's decision, apparently in an effort to show the decision was not a "smart" business decision from a financial accounting viewpoint, are therefore completely irrelevant to proving any of the claims in this case.

2. The NLRB Subpoena Seeks Irrelevant, Confidential Personnel Information.

Numerous requests in the NLRB Subpoena ask for confidential personnel information. By way of example, Request Nos. 227 through 237 seek information regarding 176 supervisors, managers, and agents identified in the Consolidated Complaint (see Request No. 226), including documents regarding their qualifications and responsibilities (Request No. 228); their "entire personnel files" (Request No. 229); and information regarding their salaries, benefits, and bonuses (Request No. 234). This type of confidential personnel information regarding supervisors, managers and on-air talent cannot possibly have any relevance to the claims before the Board, and is not subject to subpoena. It could, however, significantly harm CNN if

disclosed. CNN's competitors would like nothing more than to have access to its payroll information, which would certainly be useful in enticing CNN's top talent to leave CNN. This information, although invaluable to CNN's competitors, has little relevance to the instant matter.

3. The Subpoenas Seek Information Regarding Jobs That Were Not A Part Of Team Video's Bargaining Unit.

Sixty-four of the requests in the NLRB Subpoena seek information regarding "freelancers."[30] See Request Nos. 8, 50, 55, 71, 74, 80, 82, 90, 100, 134-35, 139-40, 153-54, 159, 166, 169-80, 182-88, 192-205, 209, 211-15, 218-21, 236-37, 241-42. The issue of "freelancers" was raised between the parties previously. On September 7, 2004, the General Counsel served requests for information on freelancers on CNN. See September 7, 2004 letter from the General Counsel to Z. Fasman, Exhibit I to Exhibit 1. CNN responded to the letter in great detail, explaining CNN's use of freelancers in the past, why information regarding freelancers was wholly irrelevant to the General Counsel's investigation, why certain requests raised privacy concerns, and offering to provide documents responsive to the requests. See September 29, 2004 letter from Z. Fasman to the General Counsel, Exhibit J to Exhibit 1. CNN also explained to the General Counsel that it does not maintain a list of freelancers in its normal course of business, and therefore to create such a list would be unduly burdensome. See id. The General Counsel neither responded to this letter, nor contacted counsel for CNN to discuss the matter further. Now, almost three years later, the General Counsel repeats its earlier requests from 2004 and adds even more requests regarding freelancers, again without regard to the burden and relevance of the information requested. Freelancers are completely irrelevant to any issue in

[30] CNN does not have a job classification for "freelancers." CNN interprets this term to mean workers hired on a temporary basis or through an outside staffing agency.

dispute in this case. Although Team Video hired freelancers from time to time while providing services to CNN, CNN did not hire such individuals and has no information regarding them.

Additionally, a number of requests in the NLRB Subpoena demand information regarding editor/producers. See Request Nos. 13, 57-58, 92, 106-08, 157. This information has no relevance to the claims before the Board, because editor/producers in the Washington Bureau have always been CNN employees and never represented by a union. Although NABET at one time represented editors in the New York Bureau, CNN brought all editing work in-house in early 2002 and created a new job classification of editor/producer, and Team Video never provided CNN with editor/producers in New York. Similarly, the Local 31 Subpoena seeks information about "Production Assistants" and "Directors," which are not relevant to the issues in this case. See Request Nos. 2f, 2j.

IV. CONCLUSION

CNN cannot respond to the overbroad, unduly burdensome Subpoenas without expending a tremendous amount of time and money. The Subpoenas cast a broad net, fishing for improper discovery. They are not narrowly tailored to the issues in dispute. They fail to apply the relevant principles of electronic discovery. They invade the reporter's privilege and the attorney-client privilege. CNN therefore requests that the Board reverse the decision of the Administrative Law Judge to deny CNN's Petition to Revoke Subpoena Duces Tecum No. B-522050 and Petition to Revoke Subpoena Duces Tecum No. B-441992. Both Subpoenas should be revoked by the Board.

DATED: December 6th, 2007

Respectfully submitted,

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CNN AMERICA, INC.

EXHIBIT 1

Exhibit G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC,
JOINT EMPLOYERS

Case 5-CA-31828

and

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES &
TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 31, AFL-CIO

and

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC,
JOINT EMPLOYERS

Case 5-CA-33125
(formerly 2-CA-36129)

and

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES &
TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 11, AFL-CIO

DECLARATION OF STUART HANLEY

I, Stuart Hanley, hereby declare as follows:

1. I am employed by Kroll Ontrack as a Senior Electronic Evidence Consultant. I have worked for Kroll Ontrack since 1987 in a variety of technical and operational roles, and have been involved with all aspects of Electronic Discovery since 2000. In my capacity at Kroll Ontrack, I work closely with law firms and corporations to provide senior level consultative services and guidance on major litigations and regulatory affairs. I provide guidance on the state-of-the-art technology available today to meet the needs of the customer. I also regularly assist attorneys and litigation support professionals in understanding technology, and serve as a

conduit between corporations' IT personnel and the legal staff. I provide Kroll Ontrack clients advice in regard to data preservation, spoliation prevention, data capture, and overall e-discovery strategy for litigation.

2. In my work at Kroll Ontrack, I have acquired electronic discovery expertise in a wide range of operating systems, software programs, and almost all media types. I have testified in numerous lawsuits regarding electronic discovery issues, and I have also served as a court-appointed expert for all aspects of the electronic discovery process. I regularly speak at electronic discovery seminars and workshops around the country for America's Top 200 law firms and Fortune 500 companies. I have published several articles on data recovery and have conducted presentations for the Federal Bureau of Investigations, Federal Trade Commission, and many other governmental and Fortune 500 clients.

About Kroll Ontrack

3. Kroll Ontrack, a wholly-owned subsidiary of Kroll, Inc., is the world's largest data recovery and electronic discovery company. Kroll Ontrack's clients include, among others, large law firms, Fortune 500 companies, defense contractors, federal law enforcement agencies, other government agencies and the U.S. military. Kroll Ontrack is in the business of recovering, searching, culling and producing computer data for litigation and regulatory matters. Kroll Ontrack has performed data recovery and electronic discovery services for more than 100,000 customers since 1985. Kroll Ontrack has substantial experience in both the computer forensics and electronic discovery fields. Kroll Ontrack is a leader in the electronic discovery industry and uses state-of-the-art, industry-leading processes. Kroll Ontrack's processes and procedures have often set the industry standard and have been used in hundreds of complex legal and regulatory matters.

4. Kroll Ontrack is frequently engaged by parties to assist in the production of electronic files for review. These engagements require Kroll Ontrack engineers to be conversant in all types of storage media (including back-up tapes) and all associated software versions and updates thereto and have experience with all types of operating systems as well as e-mail systems. Kroll Ontrack engineers and project management staff additionally are called on to advise as to how the universe of data at issue can be culled for review purposes. Such techniques can include, but are not limited to, narrowing the universe of data to be searched by way of searching the data for key words, eliminating redundant documents, and limiting the searches by time period. Kroll Ontrack also has the ability to engage in forensic recovery of deleted, damaged, or otherwise unreadable data.

5. Kroll Ontrack has substantial experience working as experts on projects for the top law firms in the country. In fact, a recent American Lawyer survey, which was published on Law.com, named Kroll Ontrack as the electronic evidence expert relied upon most by the nation's top law firms.

6. A copy of Kroll Ontrack's Curriculum Vitae is attached to this Declaration as Exhibit 1.

The CNN Subpoena

7. Kroll Ontrack and I have been asked by counsel for CNN America, Inc. ("CNN") to provide an estimate of the cost and time necessary to provide certain electronic discovery services in connection with CNN's response to Subpoena No. B-522050. That estimate is attached to this Declaration as Exhibit 2.

8. In creating the estimate, Kroll Ontrack used the following assumptions:

(a) The active electronic files of 88 employees would be collected on-site from the desktop and/or laptop computers of those employees, and from any network servers on

which the employees store active files. In the on-site collection, Kroll Ontrack would use software that creates an exact byte-by-byte copy of the computer's hard drive.

(b) The 88 custodians would have maintained between 100 and 200 computer hard drives.

(c) CNN would provide Kroll Ontrack with a copy of the active Exchange E-Mail mailbox for each of the 88 employees.

(d) CNN would provide Kroll Ontrack with 60 CDs or DVDs containing electronic files of former employees.

(e) CNN would provide Kroll Ontrack with approximately 16,000 disaster recovery backup tapes that would need to be restored.

(f) In Kroll Ontrack's experience and based on historical data, an average custodian maintains between six and eight gigabytes of process able data. However, if the requirement were to restore data from 16,000 backup tapes this number would probably increase ten to twenty fold.

(g) In Kroll Ontrack's experience and based on common industry conventions, a gigabyte of data translates very roughly into 50,000 to 75,000 pages.

(h) In this project, it is estimated 15 to 25 percent of the original source data for each custodian would be uploaded for review and processing, because 75 to 85 percent of the original source data would be filtered out using de-duplication and key word techniques. It is also estimated 20 to 30 percent of the documents reviewed would be produced as responsive and non-privileged.

(i) Responsive documents would be produced as a tiff image production, with accompanying meta-data in a load file format. If documents were also to be produced in native format, the cost estimate would be even higher.

9. Generally, restoration of disaster recovery backup tapes takes approximately four hours per tape. In this matter, the restoration of approximately 16,000 tapes would take approximately 64,000 hours.

10. To recover and produce deleted files and file fragments from a hard drive, a forensic analysis of the drive is necessary. Such an analysis typically takes five to seven days for an average hard drive, and costs $3,300 per drive using Kroll's standard pricing.

I declare under penalty of perjury under the laws of the State of Minnesota that the foregoing is true and correct.

Executed this 17th day of September, 2007, in Eden Prairie, Minnesota.

Stuart Hanley

Exhibit 1

Kroll Ontrack®

CURRICULUM VITAE

Kroll Ontrack
9023 Columbine Road
Eden Prairie, MN 55347
Toll Free: 800-347-6105
Phone: (952) 937-5161

Company Background

About Kroll Ontrack

Kroll Ontrack provides cutting-edge technology solutions for the electronic discovery, paper discovery, computer forensics, and data recovery markets. Providing computer software and services to law firms, corporations, federal agencies and individuals, Kroll Ontrack enables the discovery, collection, investigation and production of electronic and paper information. Formerly known as ONTRACK Data International, Inc., Kroll Ontrack brings technology expertise to the world's leading risk consulting company Kroll Inc.

Company History

The company was founded in 1985 by three gentlemen who saw a need in the disk drive market and developed a software product, called Disk Manager® that made the process of installing a computer hard disk much easier. In 1987, the company formed Ontrack Data Recovery Inc. and pioneered the tools and techniques for the data recovery industry. After eight years of providing data recovery services, the Company began to encounter more and more requests from attorneys, law enforcement agencies and investigators who would ask the Company to keep a chain-of-custody record on the storage media when performing a data recovery services. Not only were customers using Ontrack Data Recovery to recover lost data due to hardware malfunction or user error, they were using the services to recover deleted information. This phenomenon led the Company to offer computer evidence services in 1995, although the demand in the marketplace was just emerging. In June 2002, Kroll Inc., which had been providing Computer Forensic services to its clients since 1988, acquired Ontrack and formed a new wholly-owned subsidiary of Kroll named Kroll Ontrack. In 2003 and 2004, Kroll Inc. acquired the domestic and international market leaders in paper scanning and coding – Quorum Litigation Services and Oyez Legal Technologies – allowing Kroll Ontrack to offer a full range of paper and electronic discovery solutions to its clients. Today, Kroll Ontrack continues to serve the same customers it has for years, while growing its electronic evidence and legal technology businesses, services that are complementary to Kroll's security and risk consulting services. In 2004, Marsh & McLennan (MMC) acquired Kroll Inc.

Number of Employees

Kroll Ontrack is staffed with over 1,500 seasoned electronic evidence and data recovery engineers, legal consultants, software developers, customer support staff and other employees. Kroll Inc. employs over 3,500 staff members worldwide.

Locations

Kroll Ontrack is headquartered in Minneapolis, Minnesota, and operates several other offices strategically placed around the globe, including: California, Washington D.C., New York, Delaware, Paris, London, Germany, Canada, Australia, Poland, Switzerland, the Philippines, India, and Madrid. Domestic computer forensic labs are based in California, Minnesota, New Jersey, and Washington D.C. Electronic discovery processing takes place in the Minnesota and London facilities. Paper scanning and coding takes place in Minnesota, Delaware, California, the Philippines, and India. A multimillion dollar, state-of-the-art data center, with almost four petabytes of active storage capacity, is located in Minnesota.

Kroll Ontrack™

Employee Experience

Kroll Ontrack's engineers come from a myriad of forensic, technical, and software development backgrounds. Our industry-leading position in this arena requires our engineers to be conversant in all types of media, as well as experience with many types of operating systems, email packages, and software packages. The collective experience of our technical staff is summarized below:

Experience In the Following Hardware and Media Types
DESKTOPS
FLOPPY DISKETTES
FIREWIRE DRIVES
IDE DISK DRIVES
INTERNAL DRIVE MECHANICS
- DRIVE ELECTRONICS
- STEPPER MOTORS

LAPTOPS
MAGNETIC TAPES
NAS
PERSONAL DATA ASSISTANTS (PDA'S)
RAID ARRAYS
REMOVABLE MEDIA (FLOPPY DISKS, IOMEGA ZIP DISKS, IOMEGA JAZ DISKS, OPTICAL CARTRIDGES, CD/DVD ROM, SMART MEDIA, FLASH MEMORY AND MEMORY MEDIA CARDS)
SANS
SCSI DISK DRIVES
SERVERS
USB DRIVES

Experience In The Following Operating Systems
APPLE MACINTOSH OS 7 TO OS X
CRAY RESEARCH COS & UNICOS
DEC VMS & RSX-11M
DOS
IBM AIX
IBM OS/2
IBM VM
LINUX (VARIOUS PLATFORMS)
MICROSOFT WINDOWS 3.X, 95, 98, ME
MICROSOFT WINDOWS NT 3.5.1, NT 4.0, 2000, XP, 2003
NOVELL NETWARE 2.X TO 6.X
UNIX (VARIOUS PLATFORMS INCLUDING SUN SOLARIS, SGI, BSD)
VMWARE

Experience In The Following Computer Forensics Tools
Kroll Ontrack Developed Data Recovery Tools for Examining File Systems:
FAT16
FAT32
HFS
HFS+
NTFS
NWFS
EXT2, EXT3
UFS

Kroll Ontrack Developed Investigative/Analysis Tools for Examining:
Operating Systems:
- APPLE MACINTOSH
- DOS (VARIOUS PLATFORMS)
- LINUX (VARIOUS PLATFORMS)
- MICROSOFT WINDOWS (ALL VERSIONS)
- NOVELL NETWARE
- UNIX (VARIOUS PLATFORMS)

Software / Email Programs:
- AOL EMAIL
- IBM LOTUS NOTES
- MICROSOFT EXCHANGE
- MICROSOFT OFFICE SUITE
- MICROSOFT OUTLOOK EMAIL
- MICROSOFT OUTLOOK EXPRESS EMAIL
- NETSCAPE EMAIL
- NOVELL GROUPWISE
- POP3 EMAIL SERVICES

Other Computer Forensics Tools for Examining:
Operating Systems:
- APPLE MACINTOSH
- DOS (VARIOUS PLATFORMS)
- LINUX (VARIOUS PLATFORMS)
- MICROSOFT WINDOWS (ALL VERSIONS)
- NOVELL NETWARE
- UNIX (VARIOUS PLATFORMS)

Software / Email Programs:
- AOL EMAIL
- INTERNET-BASED EMAIL
- NETSCAPE EMAIL
- POP3 EMAIL SERVICES

Specific Commercial Forensic Toolsets:
ACCESSDATA DISTRIBUTED NETWORK ATTACK
ACCESSDATA FORENSIC TOOLKIT

ACCESSDATA PASSWORD RECOVERY TOOLKIT
ASRDATA SMART
FOUNDSTONE TOOLS
GUIDANCE SOFTWARE ENCASE 3.X TO 4.X
NEW TECHNOLOGIES, INC SAFEBACK
SNAPBACK DATARREST SUITE
TCPDUMP/WINDUMP
WINHEX

Experience In The Following Software Programs
ADOBE FRAMEMAKER
ALTIRIS DEPLOYMENT SERVER
AOL EMAIL
ARCHIVAS INC. ARC SOLO/ARC SERVER
AUTODESK AUTOCAD
COMPUTER ASSOCIATES VET ANTI-VIRUS
CONCORDANCE DBMS
COREL WORD PERFECT
DBMS TOPOLOGIES
DTSEARCH
EUDORA EMAIL
IBM LOTUS NOTES EMAIL
INTERNET EXPLORER
KROLL ONTRACK DATA ADVISOR
KROLL ONTRACK DISK MANAGER
KROLL ONTRACK EASYRECOVERY PROFESSIONAL
KROLL ONTRACK POWERCONTROLS
MICROSOFT BACKUP
MICROSOFT EXCHANGE
MICROSOFT FLASH
MICROSOFT FRONTPAGE
MICROSOFT MSN MESSENGER
MICROSOFT OFFICE SUITE
MICROSOFT OUTLOOK EMAIL
MICROSOFT OUTLOOK EXPRESS EMAIL
MICROSOFT PUBLISHER 97/98/2000
MICROSOFT SQL SERVER
MICROSOFT VISIO
MICROSOFT VISUAL STUDIO 6
MYSQL
NETSCAPE
NORTON UTILITIES
NORTON & MCAFEE ANTI-VIRUS
NOVELL GROUPWISE
ORCAD PSPICE
SYMANTEC GHOST
UNIX BACKUP (TAR AND CPIO)
VERITAS BACKUP EXEC
WATERLOO MAPLE SOFTWARE: MAPLE EMAIL

Experience In The Following Programming Languages
ADA
ASSEMBLER (INTEL)
BASIC
C
C++
COBOL
CRAY RESEARCH APML & CAL
FORTRAN
HTML
INTEL 8080/8085
JAVA
PASCAL
PERL (INCLUDING PERL CGI AND DBI)
SCRIPT/ BATCH INTERPRETERS: IBM EXEC & REXX; UNIX SHELL (C, BOURNE)
SQL
VBA
VISUAL BASIC 5
XML AND XSL

Training and Certifications

Kroll Ontrack staff members possess advanced studies or certifications relevant to their job duties. Such advanced studies or certifications include the following:

- Many Kroll Ontrack Project Managers have PMP (Project Management Professional) certifications, are in the process of attaining a PMP certification, and/or have advanced project management training.
- Our Computer Forensic Engineers hold a combination of the following certifications: EnCase Certification, CISSP (Certified Information Systems Security Professional), CFCE (Certified Forensic Computer Examiner), CFE (Certified Fraud Examiner), CIFI (Certified Information Forensics Investigator), CDRP (Certified Disaster Recovery Planner), CEECS (Certified Electronic Evidence Collection Specialist, and CCI (Computer Crime Investigator).

- Kroll Ontrack personnel possess various technical training and certifications, including but not limited to: Microsoft Certified Systems Engineer Certification, Microsoft Certified Professional, and Certified Protection Professional.
- Kroll Ontrack legal consultants hold Juris Doctorate degrees. A number of our other staff members also hold or are currently pursuing graduate and/or Juris Doctorate degrees.
- Legal consultants and other Kroll Ontrack personnel are also often called on as speakers for professional organizations around the world and are frequently interviewed or quoted in the media. Our staff members have collectively authored or co-authored a number of books as well as dozens of articles.

Representative Project Expertise – Government

Kroll Ontrack has had global experience in handling computer forensics matters for numerous government agencies as well as comprehensive experience in managing the combination of electronic and paper documentary evidence. As a government contractor, Kroll Ontrack has worked with the following government agencies:

- Federal Bureau of Investigation (FBI)
- U.S. Department of Justice (DOJ)
- Securities Exchange Commission (SEC)
- Homeland Security
- Secret Service
- Various branches of the military
- U.S. Attorney's Offices

Kroll Ontrack has participated in more than 150 computer forensics investigations over the last three years for local, state and federal agencies as well as the FBI.

Representative Project Expertise – Computer Forensics

Commended for Uncovering Computer Sabotage

The Third Circuit affirmed a judgment convicting the defendant of planting a computer "time bomb" that crippled operations at New Jersey-based Omega Engineering Corp. The ruling reinstated the verdict in which the defendant was convicted on one count of computer sabotage. Kroll Ontrack computer experts were essential in recovering the evidence of the "time bomb". Kroll Ontrack received special commendation from the Secret Service for aiding the AUSA in securing one of the first computer fraud convictions under 18 USC 1030.

Filegate Matter from the Clinton-Gore Administration

Kroll Ontrack was retained in the *"Filegate"* matter, *Alexander v. FBI*, Civ. Action Nos. 96-2123/97-1288 in the United States District Court for the District of Columbia. This case involved technical issues surrounding the copying, restoration and retrieval of email from the Clinton-Gore White House that was the subject of numerous lawsuits and Congressional inquiries. Kroll Ontrack engineers and project managers provided neutral technical testimony and assistance to the court and were subject to lengthy examinations from plaintiff's counsel, Department of Justice attorneys, as well as the Honorable Royce C. Lamberth.

Special Master Assistance in Federal Court

Kroll Ontrack was appointed as an expert to assist a Special Master inquiring into issues of spoliation of email evidence in a Federal lawsuit venued in the United States District Court for the District of Nebraska. Kroll Ontrack was asked to: identify any electronic data remaining on Defendants' computers after the unintentional overwriting of the Defendants backup system; identify and, if possible, restore deleted or damaged files from said system; and assist the Special Master in all technical inquiries related to the matter.

Florida Secretary of State Katherine Harris Computer Investigation

A consortium of news media outlets, searching for potential election fraud in the 2002 presidential election, requested complete forensic analysis on Florida Secretary of State Katherine Harris' office computers. With a portable server in tow,

Kroll Ontrack computer forensic engineers mirror imaged four hard drives onsite and conducted a full forensic analysis. The work was completed in approximately 20 hours. The engineers performing the work participated in press conferences and conference calls to explain the findings.

Civil Litigation Leads to Possible Federal Prosecution

Kroll Ontrack engineers analyzed images from nine hard drives and prepared detailed expert reports for presentation in federal court. The case involved a former employee hacking into the company's system after the employee's employment ceased. Based in large part on Kroll Ontrack's assistance, the corporate client was granted a directed verdict. The case was presented for possible Federal criminal prosecution and the report was forwarded to the Federal prosecutor's office. Kroll Ontrack has been requested by the Federal Prosecutor's office to assist in further analysis and likely testimony in the criminal case.

International Data Collection

Working on behalf of the Office of the High Representative for Bosnia and Herzegovina Kroll Ontrack computer forensic teams, working with the NATO Peace Stabilization Force (SFOR), simultaneously undertook collection of data from PC's, servers and mainframes at 10 locations of Banca Herzekovaka located throughout Bosnia. There was evidence that the bank was being used to fund the unlawful breakaway of a province with possible subsequent genocide. The work was complicated by violent armed resistance offered at some of the offices, and it was necessary to operate in those areas under battlefield conditions. It also became necessary to revisit the bank's headquarters in Mostar and physically remove the storage components of the mainframe computer back to a NATO base for analysis.

Expertise in Times of War

In the 5 days following the end of Operation Desert Storm in the first Gulf War, Kroll computer forensics specialists, working with intelligence gathering teams from the Kuwait Security Service and with security teams from Coalition forces, imaged 60 computers located in about a dozen locations within Kuwait that had been used by Iraqi occupation forces. We provided analysis of the content of these computers on-site in Kuwait in support of both Kuwaiti and Coalition operations.

Recovering Files Others Claimed Impossible to Crack

Working on behalf of one of the largest district attorney's offices in the United States, Kroll Ontrack was able to recover over 30,000 highly confidential files when another computer forensics company could not. The documents were stored on two CDs and written in a foreign language. The other computer forensics company could not open the files, surmising that they were encrypted or compressed. Kroll Ontrack engineers determined that the files contained non-standard headers that prevented them from opening. The engineers replaced the non-standard headers with a readable standard format, enabling the district attorney's office to open, read, and analyze the files.

Expertise in Safeguarding Computer Hard Drives

In complying with a subpoena from the DOJ, a Fortune 50 pharmaceutical company needed to produce certain documents. The pharmaceutical company had previously hired a document management company to manage the recycling process for hard drives of former employees. The recycling company wiped out certain machines that should have been preserved, putting the client at risk given the DOJ subpoena. As a result, the pharmaceutical company turned to Kroll Ontrack to create images of any hard drives that were scheduled for recycling. To date, Kroll Ontrack engineers have imaged over 2,100 hard drives for the pharmaceutical company and is storing the images in a fire-protected, temperature controlled storage facility.

Accessing Chinese Source Code

In a case involving allegations of stolen proprietary software code, Kroll Ontrack computer forensics specialists were appointed by the court to determine if there was evidence of theft. Kroll Ontrack imaged five hard drives, containing Chinese source code, and prepared to keyword search the drives. Because the source code was in a foreign language, a Kroll Ontrack computer forensics engineer created a method for searching the code using Chinese characters. Using this method, the engineer searched for active, deleted, unallocated, and email data. The engineer recovered deleted PST files and data, containing relevant emails, from the unallocated space.

Kroll Ontrack®

Judicial Recognition

Kroll Ontrack is recognized by courts as a leader among electronic evidence experts. A few examples of published decisions include:

Sony Computer Entertainment Am., Inc. v. Filipiak, 2005 WL 3556676 (N.D.C al. Dec. 27, 2005). "A [Kroll Ontrack] computer forensics expert, however, determined that thousands of files had been deleted from the hard drive within the three-day period prior to production of the hard drive...("Rothschild Decl."). Among these files were numerous documents whose titles indicate they related to sales figures...Based on this evidence, the Court finds that Filipiak intentionally and in bad faith violated the terms of the Consent Judgment as well as his discovery obligations under Rule 26 of the Federal Rules of Civil Procedure."

Quinby v. WestLB AG, 2005 WL 3453908 (S.D.N.Y. Dec. 15, 2005). "[Kroll Ontrack electronic evidence consultant Stuart] Hanley's affidavit described the costs and amount of time it will take to restore back-up tapes. Hanley stated that, to search data on back-up tapes, Kroll must restore the tapes by "uncompressing" the data on each tape onto a computer server... The time it would take to restore each tape varies by how much data is stored on the tape and Hanley estimated that it could take approximately eight to ten hours to 'duplicate, restore and convert' an individual tape and two to four weeks to 'restore and convert' the 98 yearly tapes.

Paramount Pictures Corp v. Davis 2005 WL 3303861 (E.D. Pa. Dec 2, 2005). "Paramount requested access to Davis' ...computer in order to investigate the hard drives of his computer by a third party forensic specialist, Kroll Ontrack...Upon completion of its analysis, Kroll reported...Davis wiped his hard drive clean of all data, and then reinstalled an operating system."

MMI Prods., Inc. v. Long, 2005 WL 757073 (D.Md. Apr. 1, 2005), *rev'd*, 2005 WL 2334158 (D.Md. Aug. 15, 2005). "[Kroll Ontrack Computer Forensic Expert Peter] Wolf...agreed that the laptop's internal time clock was out of sync, which he attributed to a loss of battery power after Long returned the laptop to MMI. But Wolf challenged Velasco's [the opposing side's expert] suggestion of possible restoration activity, having discovered on his own on a Dell computer support website that the laptop in question had been shipped to MMI on December 21, 2002, *after* the date Velasco surmised that the restoration activity might have taken place. Wolf criticized Velasco for failing to determine the manufacture or shipping date of the computer. Wolf also concluded that any deletions or overwrites were the result of normal processes, not efforts by a user to delete information, and that the same was true with respect to the e-mail fragments and other data found in unallocated space. Wolf opined that this "should not imply malicious activity by a user absent other evidence."

United States v. Lloyd, 269 F.3d 228 (3rd Cir. 2001); *Lloyd v. United States*, 2005 WL 2009890 (D.N.J. Aug. 16, 2005). Kroll Ontrack "testified at trial that 'issu[ing a] delete ... would be similar to someone just taking a piece of paper and putting it into the trash bin, [but] issuing a purge, that is going to take what's in the trash bin, ... shred it into very small pieces, ... and throw[ ] them all up in the air.'" ... "[Kroll] Ontrack's director of worldwide data recovery services, whom the government describes as 'the world's foremost expert in Novell networking,' testified at trial that this purge was intentional, and only someone with supervisory-level access to the network could have accomplished such a feat. The government describes Olson's testimony as suggesting that 'only an individual with system administrative skills, programming skills, Microsoft Windows experience, and independent knowledge of how to change the deleting program's message could have' committed the act of computer sabotage."

Medtronic v. Michelson, 2003 WL 21212601 (W.D. Tenn. May 13, 2003). "Medtronic has advised the court that its desired vendor is Kroll Ontrack, who will complete the above procedures (restoration, searching, and de-duplicating)..."

Tulip Computers Int'l v. Dell Computer Corp., 2002 WL 818061 (D.Del. Apr. 30, 2002). "[T]he procedure that Tulip has suggested [as advised by Kroll Ontrack] for the discovery of email documents seems fair, efficient, and reasonable."

Antioch v. Scrapbook Borders, Inc, 2002 WL 31387731 (D.Minn. Apr. 29, 2002). "Therefore, in order to ensure the recovery, and preservation, of such information, Antioch has proposed that a neutral computer expert retrieve the stored data...'[Kroll] Ontrack Data International, Inc.' ('Ontrack')."

Kroll Ontrack®

Testimony Experience

Kroll Ontrack's computer forensic engineers have extensive expert testimony training and experience in presenting forensic findings to the judge, jury, or opposition. Each computer forensic engineer maintains updated Curriculum Vitae, listing each case in which he or she has provided testimony. In November 2003, all computer forensic engineers participated in an "Expert Witness Workshop" designed exclusively for Kroll Ontrack by a team of law professors. All forensic engineers participated in a follow-up "Expert Witness Workshop" in April 2005, designed to improve their expert testimony skills.

Awards

Kroll Ontrack is the proud recipient of the following national awards:

- "Most Used Electronic Discovery Provider," *Legal Assistant Today reader survey*, 2005
- "Laureate Award – Information Technology," *Computerworld Honors Program*, 2005
- "Reader's Choice Electronic Discovery Winner," *Law Office Computing*, 2005
- "Reader's Choice Electronic Discovery Winner," *Law Office Computing*, 2004
- "Second Most Used Online Document Repository," *Annual AmLaw Tech* Survey, 2005
- "Top Electronic Data Discovery System," *Law Technology News*, 2004
- "Top Electronic Evidence Vendor," *Annual AmLaw Tech* Survey, 2002-2006
- "Best Practices in Enterprise Management – Honorable Mention (top 5)," *Computerworld*, 2005
- United States Secret Service Recognition, 2000
- James S. Cogswell Award from the United States Department of Defense, 1998
- James S. Cogswell Award from the United States Department of Defense, 1995
  *****Note: The Cogswell Award is given to less than one-half of one percent of all Defense Contractors nationwide for Excellence in Industrial Security.*

Exhibit 2

KROLL ONTRACK®

	Unit	Price Per Unit	Low Estimated Quantity	High Estimated Quantity	Low Estimated Price	High Estimated Price	Notes
STAGE 1: COLLECTION PHASE							
On-Site Data Collection	Hour	$295.00	120	180	$35,400.00	$53,100.00	1
Plus expenses (8 hour min/eng/day + 2 hour prep time/onsite)							
Media Processing	Tape	$500.00	16,000	16,000	$8,000,000.00	$8,000,000.00	
	HD	FREE	-	-	$0.00	$0.00	
	CD/DVD	$50.00	60	60	$3,000.00	$3,000.00	
(The tape fee listed is Kroll Ontrack's standard price and is subject to volume discounts with further scoping)							
SUB TOTAL COLLECTION PHASE					$8,038,400.00	$8,056,100.00	
STAGE 2: FILTERING PHASE							
Custodian Filter	User	$700.00	88	88	$61,600.00	$61,600.00	2
(Flat Fee, no limit to the amount of data filtered per custodian)		Source GB/Cust	6	8			
(Includes de-duplication, keyword, date range and file type filtering)		Source GB Total	528	704			
Early Processing Metrics Fee	Pre-Filtered GB	$100.00	528	704	$52,800.00	$70,400.00	3
Up to 3 iterations of filtering criteria							
(Typically Kroll Ontrack recommends that only a sample of the source data be run under Early Processing Metrics)							
GBs and TIFFs Available for Review							4
Estimated GB (post-filter)	GB		80	176			
Estimated Pages per Custodian (post-filter)	Pages		30,000	70,000			2
Estimated Total Pages (post-filter)	Pages		2,640,000	6,160,000			
SUB TOTAL FILTERING PHASE					$114,400.00	$132,000.00	
STAGE 3: PROCESSING AND REVIEW PHASE							
Native File Processing (Ontrack Inview)	GB	Total	80	176	$216,000.00	$467,600.00	2
1-100 gigabytes	GB	$2,700.00	80	100	$216,000.00	$270,000.00	
101-500 gigabytes	GB	$2,600.00	-	76	$0.00	$197,600.00	
500 + gigabytes	GB	$2,500.00	-	-	$0.00	$0.00	
Assumes 15% to 25% of Source Data will be uploaded							
Import 3rd Party Docs to Ontrack Inview	Page	$0.05	-	-	$0.00	$0.00	
SUB TOTAL PROCESSING AND REVIEW PHASE					$216,000.00	$467,600.00	
STAGE 4: PRODUCTION PHASE OPTIONS							
Ontrack Inview Document Tiff Promotion	Page	$0.06	528,000	2,156,000	$31,680.00	$129,360.00	
Low Responsive Rate		20%	528,000	1,232,000			
High Responsive Rate		35%	924,000	2,156,000			
*The following production format options include Bates and Confidential Stamping							
Production Processing Fee - Load File	Page	$0.02	528,000	2,156,000	$10,560.00	$43,120.00	
SUB TOTAL PRODUCTION PHASE					$42,240.00	$172,480.00	
MISCELLANEOUS							
Forensic Deleted Recovery	Hard Drive	$3,300.00	100	200	$330,000.00	$660,000.00	
(The fee listed is Kroll Ontrack's standard price and is subject to volume discounts with further scoping)							
Forensic Analysis	Hour	$295.00	20	40	$5,900.00	$11,800.00	
Ontrack Inview Topic/Concept Set-Up and Support	1 Time Set-up	$2,000.00			$2,000.00	$2,000.00	
(Optional)							
Ontrack Inview Administrative Support (If Applicable)	Hour	$295.00	2	4	$590.00	$1,180.00	1
A typical project averages 2 - 4 hours of Admin Support							
Travel & Expenses			as incurred				5
Media (output)	CD/DVD	$4.00	-	-	$0.00	$0.00	5
	Hard Drive		as incurred				
Freight (out)			as incurred				5
SUB TOTAL MISCELLANEOUS					$2,590.00	$3,180.00	
Total Electronic Discovery Charges					$8,413,630.00	$8,831,360.00	
HOSTING (Monthly Hosting Fees Not Shown in Total Charges)							
Ontrack Inview Hosting (Native Processing)	GB	$30.00	80	176	$2,400.00	$5,280.00	6,7
Monthly Hosting	Est. # of Months		1	1			
Ontrack Inview Hosting (Promoted TIFFs)	Page/Month	$0.004	528,000	2,156,000	$2,112.00	$8,624.00	6
Monthly Hosting (Not applicable until TIFF Promotion)	Est. # of Months		1	1			
Ontrack Inview Hosting (3rd Party Import TIFFs)	Page/Month	$0.004	-	-	$0.00	$0.00	6
Monthly Hosting	Est. # of Months		1	1			

Please Note

Electronic data frequently contain compressed and/or container files. The presence of these files, in source data, may significantly increase the data volumes for processing, once the compressed/container files are uncompressed. The amount of uncompressed data submitted for processing may be beyond original project assumptions.

Assumptions:

Partial unit volumes are rounded up to the nearest whole unit
The primary language of the data set will be processed in English and be comprised of standard ASCII character
The presence of foreign language documents or non-ASCII characters in the data or OCR text may preclude processing and may adversely impact the estimated delivery timeframe
Non-ASCII characters are not searchable within Ontrack Inview
Files and email will be processed in the GMT base-0 global standard time format

Notes:

1 Labor hours are estimated based on information available at the time of creating this document. Actual labor hours incurred will be used for billing. Kroll Ontrack anticipates an average of 2-4 hours of Ontrack Inview Administrative Support services per project. The number of hours may vary from project to project and is based upon the client specified information and/or requests.
2 Page/processing volumes are estimated based on historical averages. Actual volumes will be determined by the nature of the files to be processed and the culling techniques applied during processing.
3 Any previous iteration of the filtering scheme will not be saved after a new iteration is run. Should a previous iteration of filtered data be requested as the filtering criteria for processing, Kroll Ontrack will re-filter the data to return to the previous filtering results. The number of passes already incurred will dictate whether a secondary pass at a previously run filter will be billable (each filtering cycle includes 3 passes).
4 Assumes 15% to 25% of Source Data will be uploaded
5 As incurred costs are not included in estimate.
6 Subject to monthly hosting charges.
7 Native File upload hosting is applied immediately after upload to the online repository.
8 Source Audio Files are converted to a common format for Kroll Ontrack processing and compressed to limit the amount of bandwidth required for playback. Audio file download from Ontrack Inview will be in the converted file format and Native Source file will be available for Productions.
9 Tiff promotion fee does not apply

Service Description

On-Site Data Collection
Deployment of data collection experts to customer site as part of an Electronic Discovery production of data.
Maintain a chain-of-custody on all original customer media.
Use proprietary software to create an exact byte-by-byte copy of the suspect desktop(s)/laptop(s) and/or server(s) to Kroll Ontrack's destination media.
Ability to capture data any time - day or night, work day or weekend.
Customary business expenses may include applicable travel and per diem expenses as required.

Media Processing
Maintenance of a chain-of-custody on all customer media
Restore data from each piece of media associated with project
Extract defined electronic information for further data management

Custodian Filter
Migrate all data into common format for additional preparation and high-speed processing
Include the processing of both e-mail data and data files
Identify files for further processing
Provide keyword searching for relevant and/or privilege data
Identify data from a specific time period
De-duplicate e-mail/attachments and/or data files
Filtering of data for relevant custodians, time periods, keyword searching and data restrictions

Early Processing Metrics
Perform text and meta data extraction, identification of duplicates, filtering of data and report the results.
Up to 3 iterations of filtering criteria.

Native Processing
Capture document text meta-data as defined by customer and Kroll Ontrack project manager for the purpose of importing data into Ontrack Inview
Upload native files into Ontrack Inview for review.

Topic Review / Concept Searching
Organizes documents based on topics inherent to the document set.
Allows the document set to be searched for specific concepts.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC,
JOINT EMPLOYERS

and Case 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES &
TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 31, AFL-CIO

and

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC,
JOINT EMPLOYERS

and Case 5-CA-33125
(formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES &
TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 11, AFL-CIO

AFFIDAVIT OF SERVICE

Karen C. Davis being duly sworn, deposes and says as follows:

1. I am over 18 years of age, am not a party to this proceeding, and am employed by the law firm of Paul, Hastings, Janofsky & Walker LLP, 875 15th Street, N.W., Washington, D.C. 20005.

2. On the 9th day of January, 2009, I filed, by hand delivery, an original and eight copies of Brief of CNN America, Inc. Excepting to the Report and Recommendations of Administrative Law Judge Paul Buxbaum, as well as an E-File, with Lester Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570.

3. On the 9th day of January, 2009, I served one true and correct copy of Brief of CNN America, Inc. Excepting to the Report and Recommendations of Administrative Law Judge Paul Buxbaum, by overnight mail, on the following:

David Biggar, Esq.
National Labor Relations Board
Region 5 – Washington Resident Office
1099 14th Street, N.W., Suite 5530
Washington, D.C. 20570-0001

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Allan Rose, Esq.
National Labor Relations Board
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Attorneys for NABET-CWA Local 52031

Karen C. Davis

Karen C. Davis

Sworn to before me this
9th day of January, 2009

Carole L. Stephens
Notary Public

Carole L. Stephens
Notary Public, District of Columbia
My Commission Expires 2-14-2010

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